Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

CURTIS CHEEVES & THEDORE GIBSON, et al.,

Petitioners,

v.

SOUTHERN CLAYS, INC., et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

FRANKLIN R. NIX
2931 Piedmont Road, N.E.
Atlanta, Georgia 30305
(404) 233-4141

Counsel for Petitioners

March 16, 1995

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED FOR REVIEW

In cases of a court's apparent bias against **counsel** derived from **extrajudicial** sources, does 28 U.S.C. § 455(a)'s requirement that "any judge . . . shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned" apply to a party's **counsel** with the same force and effect applicable to counsel's client **without** resort to the bias or prejudice standards of 28 U.S.C. §§ 144 and 455(b)(1) governing **parties**?

RULE 14(b) STATEMENT

The Cheeves petitioners are Lillian Cheeves Bond, Julia Inez Trawick Butts, Mamye Trawick Butts, Curtis Cheeves, Edna Mae Cheeves, Ernestine Cheeves, Frank Cheeves, Hazel Cheeves, Henry Cheeves, III, Lola Cheeves, Sarah Cheeves, Gloria Jean Crumbly, Edgar Crumbly, Jr., Curtis Elliott, Sheila Mills Gilbert, Myrian Trawick Hall, Gloria Louise Trawick Lord, Fleta Hooks Randolph, Marilyn Swinton, Clyde Trawick, Laurty Trawick, Marvin Trawick, Mary Cheeves Trawick and Stephanie Cheeves Tribble.

The Gibson petitioners are Ada Gibson Bond, Alfred G. Gibson, Robert Lee Gibson, Thedore Gibson, Willie James Gibson, Griffin Lewis, Jerry Lewis, Jimmie Lewis, Jr., Jimmie Lewis, Sr., Karen Lewis, Michael Lewis, Myron Lewis, Mary Gibson Robinson, Richard Shinholster and Sara F. Gibson Simmon.

The defendants/respondents in both *Cheeves* and *Gibson* are Southern Clays, Inc. and the Rhode Island Charities Trust.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Opinions Below	1
Jurisdiction	1
Federal Statutes Involved	3
Statement of the Case	3
A. Introduction	3
B. Nature of Petitioners' Civil Cases	5
C. History and Scope of Recusal Motions	6
D. Appeal Before the Eleventh Circuit	7
E. Extrajudicial Objective Circumstances	8
Reasons for Granting the Writ	14
Conclusion	25
Appendix	App. 1

TABLE OF AUTHORITIES

Page

CASES:

Affiliated Ute Citizens v. United States, 406 U.S. 128 (1971) 5

Bell v. Chandler, 569 F.2d 556 (10th Cir. 1978) 17

Berger v. United States, 225 U.S. 22 (1921) 22, 25, 26

Cheeves & Gibson v. Southern Clays, Inc., 113 S.Ct. 832 (1993) 1, 8, 9

Davis v. Board of School Commissioners of Mobile County, 517 F.2d 1044 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976) 4, 18

Gilbert v. City of Littlerock, 722 F.2d 1390 (8th Cir. 1983), *cert. denied*, 486 U.S. 972 (1984) 10

Haines v. Liggett Group, 975 F.2d 81 (3rd Cir. 1992) 22

Hall v. Wingate, 159 Ga. 630, 126 S.E. 796 (1924) 5

Hume v. United States, 132 U.S. 406 (1989) 5

In re Beard, 811 F.2d 818 (4th Cir. 1987) 18

In re Complaint of Judicial Misconduct, 858 F.2d 331 (6th Cir. 1988) 4

In re Cooper, 821 F.2d 833 (1st Cir. 1987) 17

In re Corrugated Container Antitrust Litigation, 614 F.2d 958 (5th Cir.), *cert. denied, Mead Corporation v. Adams Extract*, 449 U.S. 888 (1980) 1, 2

Kirkland v. National Mortgage Network, Inc., 884 F.2d 1367 (11th Cir. 1989) 1

TABLE OF AUTHORITIES – Continued

Page

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988) 3, 4, 15, 16

Liteky v. United States, 1994 U.S. LEXIS 2045, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994) 3, 4, 7

McLendon v. Georgia Kaolin Co., 782 F.Supp. 1548 (N.D. Ga. 1992) 23, 24

Moore v. McGraw Edison Co., 804 F.2d 1026 (8th Cir. 1986) 19

Phillips v. Joint Legislative Committee, 637 F.2d 1014 (5th Cir. 1981), *cert. denied*, 456 U.S. 960 (1982) 2

Souder v. Owens-Corning Fiberglas Corp., 939 F.2d 647 (8th Cir. 1991) 18, 19, 20, 21

United States v. Burt, 765 F.2d 1364 (9th Cir. 1985) 19

United States v. Gregory, 565 F.2d 1132 (5th Cir. 1981) 2, 18

United States v. Kelly, 888 F.2d 732 (11th Cir. 1989) 2, 21

United States v. Ritter, 540 F.2d 549 (10th Cir.), *cert. denied sub nom Olsen Farms, Inc. v. United States*, 429 U.S. 951 (1976) 17, 19

STATUTES:

18 U.S.C. § 401 14

28 U.S.C. § 144 ..... *passim*

28 U.S.C. § 292(b) 10, 12, 13, 14, 23

28 U.S.C. § 372(c) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 372(c)(3) 8

28 U.S.C. § 455 ..... 15, 16, 17, 18, 19, 21

28 U.S.C. § 455(a) ..... *passim*

28 U.S.C. § 455(b)(1) 3, 4, 15, 18, 19, 25

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2106 ..... 2, 14, 21, 26

O.C.G.A. § 23-2-53 24

OTHER AUTHORITIES:

F.R.Civ.P. 11 ..... 11, 12, 13, 14, 22, 23

F.R.Civ.P. 60(b)(6) 4

American Bar Association, 1990 Model Code of Judicial Conduct, Canon 3E(1) 15, 19

Story, J., *Equity Jurisprudence*, Chap. VI, Actual Fraud § 188 at 201-02 (13th ed. 1988) 5

15A Wright & Miller, Federal Practice and Procedure § 3905.1 (1992) 1

H.R. Rep. No. 93-1453, 93d Cong., 2d Sess. 1, reprinted in [1974] U.S. Code Cong. & Ad. News at 6355 17

OPINIONS BELOW

This Petition for Certiorari arises from the judgment of the Eleventh Circuit Court of Appeals dated October 24, 1994 (App. 19-20) affirming *per curiam* the summary judgment entered against Petitioners/Plaintiffs by the United States District Court for the Middle District of Georgia. (App. 7-18). The Eleventh Circuit denied Petitioners' timely-filed Petition for Panel Rehearing in its *per curiam* order of December 16, 1994. (App. 21-22).

JURISDICTION

This Court has jurisdiction to review the final judgments of the Court of Appeals by Writ of Certiorari pursuant to 28 U.S.C. § 1254(1). This Court also has jurisdiction to review previously non-appealable interlocutory orders denying motions to disqualify the district court judge. (*E.g.*, App. 4-6) *In re Corrugated Container Antitrust Litigation*, 614 F.2d 958 (5th Cir. 1980), *cert. denied, Mead Corporation v. Adams Extract*, 449 U.S. 888 (1980). These prior orders are now fully reviewable on appeal from the final judgments. *E.g., Kirkland v. National Mortgage Network, Inc.*, 884 F.2d 1367 (11th Cir. 1989); 15A Wright & Miller, Federal Practice and Procedure § 3905.1 at 250 (1992).

This Court's previous denial of Petitions for Writs of Certiorari and Mandamus/Prohibition, *Cheeves & Gibson v. Southern Clays, Inc.*, 113 S.Ct. 832 (1993) respecting the Eleventh Circuit's previous denial of Petitioners' Petition for Mandamus/Prohibition (App. 1) does not foreclose

review of prior orders denying disqualification. *E.g., Phillips v. Joint Legislative Committee*, 637 F.2d 1014 (5th Cir. 1981), *cert. denied*, 456 U.S. 960 (1982). When considering Petitioners' prior Petitions for Writ of Mandamus/Prohibition, the Eleventh Circuit and this Court were empowered to grant such extraordinary relief only if the district court was "clearly and indisputably" in error. *E.g., United States v. Gregory*, 565 F.2d 1132, 1136 (5th Cir. 1981); *In re Corrugated Container Antitrust Litigation*, 614 F.2d 958, 962 (5th Cir.), *cert. denied*, 449 U.S. 888 (1980). In the context of this direct appeal, this Court may now reverse the Eleventh Circuit's final judgment denying disqualification and order vacatur and reassignment upon a finding that the district court abused its discretion under the Eleventh Circuit's "clear error of judgment" standard. *United States v. Kelly*, 888 F.2d 732, 745 (11th Cir. 1989).

Of course, wholly apart from answering the disqualification issue vis-a-vis **counsel** presented for review, this Court has jurisdiction to vacate the judgments below and order reassignment and reconsideration of Petitioners' cases pursuant to the Court's supervisory powers under 28 U.S.C. § 2106.[1]

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[1] **§ 2106. Determination**. The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

FEDERAL STATUTES INVOLVED

Title 28 U.S.C. § 455(a) provides:

Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Title 28 U.S.C. § 455(b)(1) provides:

He shall also disqualify himself in the following circumstances:

> Where he has a personal bias or prejudice concerning **a party** . . . .

Title 28 U.S.C. § 144 provides:

Whenever a **party** to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse **party** . . . .

STATEMENT OF THE CASE

A. Introduction.

In contrast to the Court's *Liljeberg* and *Liteky* decisions[2] under 28 U.S.C. § 455(a), this Petition poses the issue of whether disqualification for **extrajudicially** acquired appearances of partiality for or against **counsel**

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[2] *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988) and *Liteky v. United States*, 1994 U.S. LEXIS 2045, 114 S.Ct. 1147, 127 L. Ed.2d 474 (1994).

shall be governed by the general "impartiality might reasonably be questioned" standard of Section 455(a), by the bias or prejudice standards of 28 U.S.C. §§ 144 and 455(b)(1) expressly applicable only to **parties**, or by the sundry other standards such as the so-called "pervasive bias exception"[3] inconsistently applied by the Courts of Appeals.

Unlike *Liljeberg*, the district court below had **actual**, not merely "constructive", knowledge of extrajudicial circumstances raising disqualifying appearances. Unlike *Liljeberg*, the vacatur and reassignment sought by Petitioners comes before this Court in the context of a **final judgment appeal** rather than a Rule 60(b)(6) vacatur sought long after the *Liljeberg* judgment had been affirmed on appeal.

Unlike *Liteky*, the disqualifying appearances involved below concerned not Petitioners themselves but rather Petitioners' **counsel**. Such appearances ensued not from judicial rulings in Petitioners' cases but rather from extrajudicial 28 U.S.C. § 372(c) judicial misconduct charges and subsequent administrative proceedings[4] initiated against the district court by Petitioners' **counsel**.

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[3] E.g. *Davis v. Board of School Commissioners of Mobile County*, 517 F.2d 1044, 1051 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976) cited in *Liteky*, *supra*, at 127 L. Ed.2d 488.

[4] In contrast to judicial proceedings, "[t]he complaint procedures of [section 372] provide administrative remedies only in the absence of appropriate judicial remedies." *In re Complaint of Judicial Misconduct*, 858 F.2d 331-32 (6th Cir. 1988).

B. Nature of Petitioners' Civil Cases.

Petitioners consist of 38 black citizens who are the heirs at law of forbears who sold their middle-Georgia lands to the Defendants/Respondents Southern Clays, Inc. and its sole shareholder, The Rhode Island Charities Trust. Petitioners' diversity cases were filed separately in early 1986 and later consolidated.

In similar fashion to the Ute Indians who were defrauded in the ***sale*** of their interests in underground oil, gas, and oilshale, *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1971), Petitioners complaints alleged counts in common law fraud, unconscionability[5] and equitable recision. Petitioners alleged that their ancestors were defrauded when Respondents purchased for only **$175,000** some 15 million tons of underground mineral reserves worth not less than **$4,900,000** according to the testimony of Southern Clays' own president. Indeed, it is undisputed in the record that Respondents purchased the

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[5] The Supreme Court of Georgia and this Court have both defined actual fraud in the form of unconscionability as follows:

> An unconscionable contract is one abhorrent to good morals and conscience. It is one where one of the parties takes a fraudulent advantage of another. An unconscionable contract is one such as no man in his senses and not acting under a delusion would make on the one hand, and as no honest or fair man would accept on the other.

Hall v. Wingate, 159 Ga. 630, 667, 126 S.E. 796 (1924); *Hume v. United States*, 132 U.S. 406, 411 (1989). The district court held Petitioners' unconscionability counts to constitute mere "constructive fraud" notwithstanding **universal** authority to the contrary. *See* Story, J., *Equity Jurisprudence*, Chap. VI, Actual Fraud § 188 at 201-02 (13th ed. 1988).

Gibson family's farm for **$40,000** in 1962 and one year later sold the **same farm** to another mineral company which insured its title to the Gibson farm for **$1,440,000!**

C. History and Scope of Recusal Motions.

During the pendency of Petitioners' cases and prior to the entry of summary judgment, the district court denied a total of five disqualifications motions, the last such order being reproduced at pages 4-6 of the Appendix. Each successive motion was predicated on the discovery of additional facts or new events raising appearances of impropriety. Counsel's dilemma was that failing to raise such new matters promptly upon their discovery would have waived such matters as a matter of law as a future basis for later disqualification through mandamus petitions or any final judgment appeal.

Petitioners' last two disqualification motions focused exclusively upon the appearances of bias and prejudice against Petitioners' ***legal counsel*** as the result of counsel's filing of a 28 U.S.C. § 372(c) judicial misconduct complaint on July 20, 1990, and ensuing events during a special committee's 20-month investigation of the district court. None of the events asserted in the fourth and fifth recusal motions, which exclusively concerned disqualifying appearances vis-a-vis Petitioners's ***legal counsel***, had **even occurred** as of the date of the district court's denial of Petitioners' third disqualification motion.

Suffice it to note here that the district court granted summary judgment against Petitioners upon the ground that their fraud claims, including even their purportedly "constructive fraud" unconscionability counts, were not

equitably tolled such that Petitioners' claims were barred by the applicable Georgia statute of limitations (App. 7-18).

D. Appeal Before the Eleventh Circuit.

Petitioners' appeal before the Eleventh Circuit challenged the district court's summary judgment upon two fundamental grounds: (1) that genuine material issues of fact regarding equitable tolling and Petitioners' underlying fraud claims barred summary judgment; and (2) that the district court's summary judgments were subject to vacatur by reason of the district court's erroneous denial of Petitioners' last two disqualification motions exclusively concerning appearances of **extrajudicially** acquired animus by the district court towards Petitioners' **counsel**.

The district court's order, and presumably the Eleventh Circuit through its affirmance, premised the denial of Petitioners' last recusal motion upon three grounds: (1) that "the alleged bias or prejudice must stem from an extrajudicial source" (App. 5) – a principle since confirmed by *Liteky*; (2) that "the alleged bias or prejudice must be against the party, not the attorney or the attorney-in-fact for the party" (App. 6); and (3) that the court's bias against Petitioners' counsel must be "so virulent that the judge's impartiality toward that attorney's client may reasonably be questioned." The last two grounds constitute core issues never previously decided by this Court under § 455(a).

E. Extrajudicial Objective Circumstances

The following facts relevant to antagonism on the part of the district court toward Petitioners' counsel, Franklin R. Nix, are as follows:

- Mr. Nix filed a judicial misconduct complaint against the district court on July 20, 1990, expressly complaining of the conduct of the district court in Petitioners' cases and others. (Eleventh Circuit, Misc. Docket No. 90-2132, Complaint).

- Page 3 of the 372(c) complaint, which was filed under oath, shows that "[i]n seventeen years of extensive litigation practice in the state and federal courts of Georgia, the undersigned, until encountering the judicial misconduct [of the district court in *Cheeves & Gibson*], had never encountered any violation of the Code of Judicial Conduct nor had occasion to seek the disqualification of any judge for any reason." *Id.*

- The specifics of the conduct complained of were provided by attaching to the Complaint 53 pages of excerpts from Petitioners' first three recusal motions filed November 19, 1989, and January 25 and May 16, 1990. (Eleventh Circuit, Misc. Docket No. 90-2132, Complaint).

- Chief Judge Tjoflat, in the exercise of his screening authority to either dismiss a complaint or appoint a special committee under 28 U.S.C. § 372(c)(3), appointed a special committee before receiving the written response of the district court. (Misc. Docket No. 90-2132, Order Appointing Special Committee; Answer to Complaint).

- During the special committee hearings Chief Judge Tjoflat stated that he convened a special committee

because "[Mr. Nix] filed a complaint which on its face disclosed all sorts of criminal activities." (Misc. Docket No. 90-2132, Transcript Vol. III, January 9, 1992, at 243).

• The special committee retained as private investigative counsel, Alan Sundberg, Esq., a former justice of the Supreme Court of Florida. Based upon an exhaustive investigation, Mr. Sundberg issued a 44-page Investigative Report containing, *inter alia*, the following conclusion:

> "The § 372 complaint raises ***serious claims*** of misconduct by Judges Fitzpatrick and Owens involving a trio of kaolin cases [including *Cheeves* and *Gibson*] . . .
>
> * * *
>
> We have investigated each of Nix's misconduct claims. In the main, your investigators conclude that the allegations of misconduct are the product of inference and speculation which are based upon very slender reeds of ***actual fact***. While the interpretation and liberal extrapolation by Nix of the ***limited facts to which he had access*** may have *understandably* raised misconduct concerns, investigation of the factual allegations of the complaint refute beyond any doubt the misconduct charges alleged in the complaint. Although we find no evidence to support the § 372 complaint, ***we hasten to add that we do not believe the complaint was filed by Nix in bad faith or with an improper motive.***"

(Misc. Docket No. 90-2132, Investigative Report, Defendants' Ex. IC-A at 6-7) (emphasis added).

• During the special committee's hearings upon the § 372(c) complaint, Petitioners' counsel was subpoenaed

to testify in support of the complaint's charges and did so testify in the presence of the district court.

• During the pendency of the special committee proceedings Chief Judge Tjoflat, pursuant to 28 U.S.C. § 292(b) found it necessary in the "public interest" to designate another district court judge to sit in Petitioners' cases on the matters identified in his order of December 30, 1991. (App. 2).

• The district court asserted in its order of June 5, 1992, its **subjective** belief that it "harbors no bias or prejudice against Mr. Nix or his clients." (App. 6).

• Outside the presence of Mr. Nix, however, the district court had previously testified under oath before the special committee as follows:

> [JUDGE OWENS]: Well, Mr. Nix, as you may have observed, is a person who when given one answer then asks you ten more questions. He talks forever. ***I frankly just can only deal with him if I say as little as necessary. And that's the posture I have. He reminds me a lot of some of the prisoners we have to deal repeatedly (sic) on*** 2255.
>
> I have to still preside over these matters, you know, in spite of his attitude towards me. And I'm not going to let his attitude toward me affect the cause of his clients. But he's still going to give his clients their day in courts (sic).
>
> JUDGE HOBBS: If it were a litigant ***other than Mr. Nix***, let's say an attorney ***other than Mr. Nix***, and he said, Judge, I understand you had a communication with Judge Fitzpatrick about this, and I know how strongly Judge Fitzpatrick

> feels about Mr. Watkins, I want to know could that conversation have affected you in any way in terms of your presiding over this thing, and would you tell me what that conversation was?
>
> [JUDGE OWENS]: Well, Judge, to be honest with you, I guess I would have to wait until that happened. **I can't answer that hypothetical.**
>
> JUDGE HOBBS: I just wondered if maybe we wouldn't all of us be somewhere else today. I don't know. (Eleventh Circuit Misc. Docket No. 90-2132, Transcript Vol. II of October 10, 1991, at 342-43) (emphasis added).

• Upon learning on June 5, 1990, that the Judicial Council was dismissing the § 372(c) charges, the district court immediately issued its order of June 5, 1992, (App. 4-6) denying Petitioners' last recusal motion and directing Petitioners' legal counsel to "show cause" why he should not be sanctioned under Rule 11 for "harassment" of the court. (App. 6).

• In response to the district court's "show cause" order on June 8, 1992, Professor L. Ray Patterson, Esq., of the University of Georgia School of Law, acting as independent legal counsel for Mr. Nix, filed a ***sixth*** motion to recuse the district court asserting identical grounds previously relied upon by Mr. Nix and incorporating by reference ***every*** prior disqualification motion previously filed in Petitioners' cases.

• The district court did not subsequently characterize the ***sixth*** disqualification motion filed by Professor Patterson as "harassment," nor did it issue an order requiring Professor Patterson to show cause why he

should not be sanctioned under Rule 11. Professor Patterson had had no involvement in the § 372(c) proceedings concerning the district court.

- Professor Patterson sought and was granted an extension through July 15, 1992, to file his written response to the district court's show cause order of June 5, 1992. (App. 4-6).

- On June 8, 1992, § 372(c) charges against the district court were formally dismissed and the district court, having been cleared of any misconduct, faced no legal impediment to resolving its own Rule 11 show cause order against Petitioners' counsel.

- During the forty-day period from issuance of the district court's Rule 11 show cause order of June 5th and the filing of Petitioners' counsel's response of July 15th, no order issued pursuant to 28 U.S.C. 292(b) appointing another judge to preside over the district court's Rule 11 hearing against Petitioners' counsel.

- Chief Judge Tjoflat did not find the "public interest" to require another § 292(b) appointment of Judge Hodges until twelve days **after** the filing of the following response to the district court's Rule 11 order.

> "This Response will demonstrate that the fifth recusal motion filed in the above-styled causes, which was not even addressed to The Honorable Wilbur D. Owens, Jr., but rather to The Honorable William Terrell Hodges, was well grounded in fact, warranted by existing law and not interposed for any improper purpose. Indeed, in order for this Court to find Plaintiffs' counsel guilty of "harassment", the Court would have to make the same finding with respect to L. Ray

> Patterson, Esq., perhaps Georgia's foremost expert in legal and judicial ethics, who filed on June 8, 1992, a motion to recuse the Court founded upon the same grounds relied upon by Plaintiffs' counsel and founded upon all seven prior recusal motions in *U.S. v. Watkins* and *Cheeves & Gibson*. Given the identical nature of the recusal motions filed by Plaintiffs' counsel and Mr. Patterson, why has the Court not termed Mr. Patterson's recusal motion as "harassment" and required Mr. Patterson to show cause why he should not be sanctioned under Rule 11? There is nothing in the record to account for such disparate treatment of counsel ***other than*** judicial misconduct and criminal charges filed by Mr. Nix but not Mr. Patterson, such that the sanctions which the Court apparently intends to impose under Rule 11 constitute purely and simply a reprisal against Mr. Nix for his exercise of rights under laws of the United States and his adherence to obligations imposed by the Code of Professional Responsibility adopted by the State Bar of Georgia."

(Response of Petitioners' Counsel filed July 15, 1992) (emphasis in original).

• Not until **twelve days** ***after*** the filing of the above-quoted response did Chief Judge Tjoflat, find pursuant to 28 U.S.C. § 292(b), that the public interest again required his appointment of District Judge William Terrell Hodges to preside over the district court's Rule 11 show cause proceedings.

• After conducting a hearing upon the district court's Rule 11 show cause order, Judge Hodges issued his unpublished order of October 30, 1992. Finding it a

case of first impression, Judge Hodges concluded: (1) that a district court has the subject matter jurisdiction to invoke Rule 11 *sua sponte* to punish harassment of the court notwithstanding the criminal contempt remedy afforded by 18 U.S.C. § 401; (2) that Rule 11 had been violated; and (3) that a "symbolic fine" of $500.00 was appropriate.

- No subsequent order ever issued thereafter requiring Professor Patterson to show cause under Rule 11 why he should be sanctioned for harassment of the district court through the filing of his ***sixth*** motion for disqualification.

- Professor Patterson's subsequent Petition for Writs of Mandamus/Prohibition filed in the Eleventh Circuit seeking the disqualification of the district court in Petitioners' cases was denied *per curiam* on June 26, 1992. (App. 1).

- At no time between Chief Judge Tjoflat's last § 292(b) appointment of Judge Hodges to sit in place of the district court and the district court's entry of summary judgment did Chief Judge Tjoflat, pursuant to § 292(b), nor the Eleventh Circuit, pursuant to 28 U.S.C. § 2106, designate or reassign another district judge to preside over Petitioners' cases.

REASONS FOR GRANTING THE WRIT

Aside from the extrajudicial source requirement satisfied by the above-stated circumstances concerning counsel's § 372(c) charges against the district court, the district

court denied disqualification under two additional grounds: (1) that "the alleged bias or prejudice must be against the party, not the attorney or the attorney-in-fact for the party" (App. 6); and (2) that the court's bias against Petitioners' counsel must be "so virulent that the judge's impartiality toward that attorney's client may reasonably be questioned." *Id.* The district court, and presumably the Eleventh Circuit by its affirmance, denied disqualification under the standards of not only 28 U.S.C. § 455(a) but also under Canon 3E(1)(a) of the American Bar Association's 1990 Model Code of Judicial Conduct. (App. 5).

Canon 3E(1):

> A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, included but not limited to instances where . . .
>
> (1) a jury has a personal bias or prejudice concerning a party or a party's **lawyer.**

This addition of bias against a party's **lawyer** as a basis of disqualification has not yet been added by Congress to § 455(b)(1) nor has the existing Code of Judicial Conduct for United States Judges adopted this 1990 Model Code provision. The change, however, reflects an important trend in professional and ethical thought. Moreover, the purpose of § 455 – to promote public confidence in the integrity and impartiality of the judicial process and the federal judiciary (*Liljeberg at 860*) – requires recognition that the disinterested, objective lay person would likely find any attempted distinction between bias and prejudice against a party versus that against a party's **counsel** to be a distinction without a

difference. Indeed, a disinterested lay observer might well find it puzzling to know that a federal judge under *Liljeberg* may be disqualified after the fact on the basis of his "constructive" knowledge of matters actually unknown to him, but is immune to disqualification if it is sought on the basis of the court's bias or prejudice against a party's **counsel,** rather than counsel's client. It requires no imagination to presume that a court's bias or prejudice against **counsel** may work harm to his client's case.

There are stark differences among the Courts of Appeal in grappling, in the absence any guidance by this Court since the 1974 amendment of § 455, with how disqualification shall be handled in the case of bias or prejudice against a party's counsel. At one end of the spectrum, is the Eleventh Circuit's holding in the case at bar, by affirmance of the district court's order (App. 4-6), that even extrajudicially source of bias or prejudice must be against the party, or the bias or prejudice against the party's counsel must be so "virulent" (App. 6) that the judge's impartiality toward the attorney's **client** may reasonably be questioned.

This imputation of bias and prejudice against **counsel** to counsel's client is not unreasonable in light of counsel's omission from § 455(b)(1). Such imputation, however, circumvents and ignores completely the general "impartiality might reasonably be questioned" standard of § 455(a), which identifies no class of protected persons at all. Indeed, the legislative history of § 455(a) demonstrates that Congress felt the change was essential to "promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the judge's impartiality, he

should disqualify himself and let another judge preside over the case." *H.R. Rep. No. 93-1453, 93d Cong., 2d Sess. 1, reprinted in [1974] U.S. Code Cong. & Ad. News at 6355.*

At the other end of the spectrum are holdings of the Tenth Circuit, which has rejected the notion that § 455 does **not** require disqualification where bias in favor of or against an attorney, as opposed to a party, is alleged. "We do not believe, however, that this is strictly true, for bias in favor of or against an attorney can certainly result in bias toward the party. Thus, if a judge is biased in favor of an attorney, his impartiality might reasonably be questioned in relationship to the party." *United States v. Ritter,* 540 F.2d 549, 462 (10th Cir.), *cert. denied sub nom Olsen Farms, Inc. v. United States,* 429 U.S. 951 (1976).

Closer to the general "impartiality might reasonably be questioned" test of § 455(a) is the Tenth Circuit decision of *Bell v. Chandler,* 569 F.2d 556 (10th Cir. 1978) (animus of district court towards government counsel found disqualifying). "Subsection (a) [of Section 455] questions whether there exists a reasonable likelihood that the cause will be tried with the impartiality that litigants have a right to expect in a United States District Court." *Id.* at 560.

Other circuits fall somewhere in between the extremes stated above. *In re Cooper,* 821 F.2d 833, 838-39 (1st Cir. 1987) (generally, clashes between court and counsel are insufficient basis for disqualification under either [28 U.S.C. §§ 144 or 455]). *Cooper* nevertheless observes that "occasionally **exceptional circumstances** do arise where a judge's attitude toward a particular attorney is so hostile that the judge's impartiality toward the client

may be reasonably questioned. Such an imputation of bias against counsel to the client is necessary under § 455(b)(1) but wholly unnecessary and unreasonable under § 455(a).

The Fourth Circuit has held that "bias against an attorney is not enough to require disqualification under § 455 unless petitioners can show that such a controversy would demonstrate a bias against the party itself." *In re Beard*, 811 F.2d 818, 830 (4th Cir. 1987) (citing *Davis v. Board of School Commissioners*, 517 F.2d at 1050-52 (5th Cir. 1975)). In relying upon *Davis*, the Fourth Circuit in *Beard* observed that "for the bias against the attorney to require disqualification of the trial judge, it must be of a continuing and personal nature and not simply bias against the attorney because of his conduct." *Beard* at 830.

Construing §§ 144 and 455 in *pari materia*, the Fifth Circuit has recognized a "pervasive bias" exception. *Davis v. Board of School Commissioners of Mobile County*, 517 F.2d 1044, 1051 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976) (exception to disqualification under § 144 exists "where such pervasive bias and prejudice is shown by otherwise judicial conduct as would constitute bias against a party."). *Accord, United States v. Gregory*, 657 F.2d 1132, 1136-37 (5th Cir. 1981).

The Eighth Circuit, after observing that each alleged act of bias was directed at a party's **counsel** and that there was no claim of bias toward the party herself, held that "antipathy to an attorney is insufficient grounds for disqualification of a judge because it is not indicative of extrajudicial bias against a party." *Souder v. Owens-Corning Fiberglas Corp*, 939 F.2d 647 (8th Cir. 1991) (citing

Gilbert v. City of Littlerock, 722 F.2d 1390, 1398 (8th Cir. 1983), *cert. denied*, 486 U.S. 972 (1984)). As to § 455, the Eighth Circuit in *Souder* further held that "a showing of bias against a party as opposed to counsel is also required under section 455 'in absence of [a] showing of bias or personal prejudice to the parties.' " *Souder* at 1399. *Accord, Moore v. McGraw Edison Co.*, 804 F.2d 1026, 1032 (8th Cir. 1986).

Equally restrictive is the test of the Ninth Circuit. "Personal bias or a prejudiced attitude must be against the party, not against the attorney for the party." *United States v. Burt*, 765 F.2d 1364, 1368 (9th Cir. 1985). Reflective of the Ninth Circuit's recognition of its conflict with other circuits is its further comment that "**other courts have suggested** that 'bias for or against an attorney can certainly result in bias toward the party.' " *Burt* at 1368 (emphasis added) (citing *United States v. Ritter, supra*).

Notwithstanding the aspirational goal of 1990 Model Code Canon 3E(1), there remains a wide disparity of standards and burdens of proof among the various Courts of Appeal as to counsel-based disqualifications. Such disparities and conflicts are not surprising in the light in the lack of any Supreme Court guidance since the promulgation of new § 455 in 1974. Instead of the reasonableness test of § 455(a), the appellate decisions cited above, in light of the express absence of counsel from the bias or prejudice tests of §§ 144 and 455(b)(1), have engrafted all manner of limitations upon the general reasonableness standard of § 455(a). Promoting public confidence in the integrity and impartiality of the judiciary is actually disserved by such restrictions.

Instead of answering the simple question of whether a disinterested objective lay person "might reasonably question" the impartiality of the judge for **any reason**, including bias against counsel, counsel-based disqualification decisions have demanded the finding of "exceptional circumstances," "pervasive bias," or "personal and continuing bias." Additionally, the disinterested objective lay person's reasonableness standard is further subjected to the question of whether the bias or prejudice against counsel, no matter how "exceptional," "virulent," "pervasive," or otherwise, can be inferred to constitute bias or prejudice against counsel's client. This plunges the process directly back into subjective speculation about whether the court would allow animus against counsel to harm counsel's client – a subjective standard abolished by § 455(a).

The lack of a consistent standard was noted by the Eighth Circuit in its 1991 *Souder* decision.

> "In *Davis*, the courting acknowledged the possibility of imputed bias if the attorney and party shared a characteristic, such as a race or ethic background, and the bias for or against the attorney was due to that shared characteristic. 517 F.2d at 1050-51. The court in *Beard* required additional proof that the alleged bias against the attorney actually caused bias to the party. 811 F.2d at 830. Finally, although the court in *Ritter* stated that bias for or against an attorney could prejudice the party, **it did not set out a standard** for determining when a finding of imputed bias would be appropriate. *See*, 540 F.2d at 452. Thus the cases generally support a theory of imputed bias only where there are alleged additional

> facts that suggest that bias against the attorney actually extends to the party."

Souder, supra, at 653, n.6 (emphasis added).

Such a struggle with imputing bias or prejudice against counsel to counsel's client represents a total abandonment of the objective reasonable standard of § 455(a), which is not limited on its face. Congress clearly did not intend to restrict or condition § 455(a) disqualification to any particular form of conduct toward or by any particular class of persons, be they parties, counsel, witnesses or otherwise. Indeed, the Eleventh Circuit's 1989 decision in *United States v. Kelly,* 888 F.2d 732, 745 (11th Cir. 1989), reflects the breadth with which the reasonableness test of § 455(a) should be applied. In *Kelly,* the Eleventh Circuit found that the district judge presiding in a criminal trial committed a "clear error of judgment" in failing to recuse himself based upon his admitted "***discomfort***" in presiding over a criminal trial in which the judge's **wife** was a close personal friend of a woman whose **husband** was called to testify as a **defense** witness. Surely the antagonism and animus of the district court in the case at bar toward Mr. Nix substantially succeeds the mere "discomfort" level held by the Eleventh Circuit in *Kelly* to satisfy the "clear error of judgment" standard for disqualification under § 455(a). Not surprisingly, Respondents never attempted to prove below that the district court is **not** biased and prejudiced against Petitioners' counsel.

Given the ability of appellate courts to reassign cases to other judges pursuant to the supervisory powers conferred by § 2106 without resorting to §§ 144 or 455, it should be noted that the Third Circuit's decision in

Haines v. Liggett Group, 975 F.2d 81 (3rd Cir. 1992) is philosophically at odds with most of the Court of Appeals' decisions reviewed above. *Haines, supra*, took pains to point out that the test for supervisory removal is the appearance of impartiality. The test "is not our subjective impressions of [the district judge's] impartiality gleaned after reviewing his decisions these many years; rather, the polestar is 'impartiality and the appearance of impartiality.' " *Haines, supra*, at 898. This is exactly the same test for recusal under § 455(a). In Petitioners' case there exist at least the following five general grounds, both extrajudicial as well as intrajudicial, reflecting the kind of virulent and pervasive prejudice against counsel which prevented Petitioners' from receiving a fair hearing upon Respondents' summary judgment motions.

First, the district court displayed actual hostility toward Petitioners' counsel engendered by the district court being subjected to § 372(c) charges. The district court's opinions about Petitioners' counsel readily equate to the disqualifying opinions stated by the district court in *Berger v. United States*, 255 U.S. 22, 28 (1921) (quoted in *Liteky* at 127 L.Ed. 490).

Second, the district court's above-quoted sworn testimony before the Eleventh Circuit special committee amazingly reflects the district court's **inability** to assure his examiner that Petitioners' cases would not fair better before him with counsel ***other than Mr. Nix.***

A third factor is the appearance of immediate retaliation and reprisal against Mr. Nix through the district court's Rule 11 show cause order, as contrasted with the district court's disparate treatment of Professor Patterson.

Professor Patterson had fully reviewed all prior recusal motions and was aware of the likelihood of incurring he same Rule 11 retaliation already visited upon Mr. Nix. But Professor Patterson nevertheless found himself ethically and professionally obliged to, in effect, "tell the emperor that he wears no clothes" through the filing of a ***sixth*** recusal motion. What accounts for the district court's failure to sanction Professor Patterson's deliberate conduct duplicating **all** of Mr. Nix's prior disqualification efforts **other than** his noninvolvement in the prior § 372(c) proceedings?

Fourth, the chief judge of the Eleventh Circuit, notwithstanding the dismissal of the § 372(c) charges and the exoneration of the district court in the proceedings, nevertheless found it necessary "in the public interest," pursuant to § 292(b), to ameliorate the obvious appearances of Rule 11 retaliation and reprisal against Mr. Nix by designating another district judge to hear the matter. Would not the disinterested objective lay person reasonably apprehend that the district court might just redouble its retaliation and reprisal when presented with the opportunity to administer the *coup de grace* to Petitioners' **and their counsel** through the granting of Respondents' summary judgment motions?

Finally, the disinterested objective lay person would wonder how it is that the district court could turn its back upon its own prior holding in which the district court ***denied summary judgment*** respecting another black family's sale of their mineral lands for a small fraction of their fair value – precedent absolutely indistinguishable in terms of the facts and substantive law in Petitioners' cases. *McLendon v. Georgia Kaolin Co.*, 782 F.Supp. 1548

(N.D. Ga. 1992). In *McLendon,* the same district court presiding over Petitioners' cases ***denied*** summary judgment as to 11 out of 12 mineral land owners' claims under the same fraudulent concealment statute relied upon by Petitioners, O.C.G.A. § 23-2-53. In granting summary judgment against Petitioners (App. 7-18) the district court could not explain why Petitioners' indistinguishable cases were not controlled by the following *McLendon* holding:

> Whether purchaser of farmland had ***duty to disclose*** that property contained **large deposits of kaolin** clay was a fact question which ***precluded*** **summary judgment** in ***fraudulent concealment claim*** [under § 23-2-53] by vendors in light of evidence that purchaser drilled on property ***prior to conveyances,*** purchaser ***did not reveal results of drilling survey,*** actual market value of property was ***greater than purchase price,*** discovery of kaolin required scientific expertise, ***which vendors did not have,*** an agent for vendors was also undisclosed agent for purchaser.

McLendon, Headnote 12 at 1549 (emphasis added).

The ***sole factor*** which Petitioners' cases lacked in comparison to *McLendon* was the noncontrolling issue of an undisclosed agent. Upon vacatur, remand, and reassignment to a district judge, the above-quoted *McLendon* holding, applied to the existing evidence in Petitioners' cases, would compel any impartial district judge to follow *McLendon* in **denying** Respondents' summary judgment motions.

CONCLUSION

Petitioners base this Petition on the above-disclosed fact of wide disparity among the Courts of Appeal in the handling of disqualification based upon extrajudicially acquired bias or prejudice against a party's **counsel.** Attempts to fit such circumstances to the language of §§ 144 and 455(b)(1) through imputation of special circumstances of bias and prejudice against counsel to counsel's client has only led to confusion ad conflict among the Courts of Appeals. More importantly, such efforts have operated to deprive litigants to resort to the § 455(a) impartiality standard which should be applied to all cases reflecting an extrajudicially acquired animus by the court against counsel. Guidance of this Court is required to address the plight of all litigants whose cases stand to be compromised as the result of bias or prejudice against their counsel. Petitioners' prior efforts, through disqualification motions and mandamus petitions before the Eleventh Circuit and this Court, have not prevented Petitioners' from finding themselves in the dilemma eloquently described by this Court in *Berger v. United States.*

> The remedy by appeal [from nonrecusal] is inadequate. It comes after the trial [or summary judgment] and, if prejudice exist, it has worked its evil, and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more illusive of estimate or decision than a disposition of mind in which there is a personal ingredient.

Berger v. United States, 225 U.S. 22, 36 (1921).

Perhaps even more important is this Court's following observation in *Berger* that in disqualifying a court

> there is no serious detriment to the administration of justice nor inconvenience worthy of mention for of what concern is it to a judge to preside on a particular case; of what concern to other parties to have him so preside?

Id. at 35.

An easy way out for the Court, and Petitioners as well, lies in utilizing § 2106 to vacate, remand, and reassign Petitioners' cases to a different district judge. But serving the interest of truly preserving the integrity and impartiality of the federal judiciary, however, required that the guidance of the Court in this case of first impression before the Court. Such guidance will undoubtedly spare other litigants before the federal courts from the years of delay, expense, and waste of judicial resources which Petitioners have incurred in honestly attempting to remedy a district court's circumvention of the disqualification statutes.

Respectfully submitted,

FRANKLIN R. NIX
2931 Piedmont Road, N.E.
Atlanta, Georgia 30305-2786
(404) 233-4141

Petitioners' Counsel of Record

IN THE UNITED STATES COURT
OF APPEALS FOR THE
ELEVENTH CIRCUIT

No. 92-8554

IN RE: ROBERT WATKINS,
THEODORE GIBSON,
CURTIS CHEEVES, ET AL.,

Petitioners.

On Petition for Writ of Mandamus/Prohibition
(Filed Jun. 26, 1992)

BEFORE: FAY, BIRCH and DUBINA, Circuit Judges.

The petition for writ of mandamus/prohibition filed in this matter is DENIED.

DESIGNATION OF DISTRICT JUDGE FOR SERVICE IN ANOTHER DISTRICT WITHIN HIS CIRCUIT
(Filed Dec. 30, 1991)

WHEREAS, in my judgment the public interest so requires; Now, therefore, pursuant to the provisions of Title 28, United States Code, Section 292(b), I do hereby designate and assign

THE HONORABLE WILLIAM TERRELL HODGES

United States District Judge for the Middle District of Florida to hold a district court in the Middle District of Georgia for an indefinite period of time beginning December 27, 1991, to handle the motions to quash the subpoenas directed to Chief Judge Wilbur D. Owens, Jr., Judge J. Robert Elliott, and Judge Duross Fitzpatrick, and any matter relating to any party's attempt to take the depositions of those judges, in *Curtis Cheeves, et al., Theodore Gibson, et al. v. Southern Clays, Inc. and The Rhode Island Charities Trust, by and through its Trustees,* Consolidated Civil Action File No. 86-43-1-MAC(WDO), and *United States of America v. Robert L. Watkins,* Criminal No. 89-46-MAC(WDO), until completion of the matter and thereafter as may be required to complete unfinished business.

/s/ Gerald Bard Tjoflat
Chief Judge
United States Court of Appeals
for the Eleventh Circuit

Dated: December 27, 1991

DESIGNATION OF DISTRICT JUDGE FOR SERVICE IN ANOTHER DISTRICT WITHIN HIS CIRCUIT
(Filed July 27, 1992)

WHEREAS, in my judgment the public interest so requires; Now, therefore, pursuant to the provisions of Title 28, United States Code, Section 292(b), I do hereby designate and assign

THE HONORABLE WILLIAM TERRELL HODGES

United States District Judge for the Middle District of Florida to hold a district court in the Middle District of Georgia for an indefinite period of time beginning July 23, 1992, to handle a hearing in which Franklin R. Nix has been ordered by Chief Judge Wilbur D. Owens, Jr. to show cause why he should not be sanctioned pursuant to Rule 11 of the Federal Rules of Civil Procedure in *Curtis Cheeves, et al., Theodore Gibson, et al. v. Southern Clays, Inc. and The Rhode Island Charities Trust, by and through its Trustees,* Consolidated Civil Action File No. 86-43-1-MAC(WDO), and *United States of America v. Robert L. Watkins,* Criminal No. 89-46-MAC(WDO).

/s/ Gerald Bard Tjoflat
Chief Judge
United States Court of Appeals
for the Eleventh Circuit

Dated: July 23, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

CURTIS CHEEVES, et al.:		
Plaintiffs,	:	
vs.	:	C.A. No. 86-43-1-MAC(WDO)
SOUTHERN CLAYS, INC., et al.,	:	86-44-2-MAC(WDO)
Defendants.	:	

ORDER
(Filed June 5, 1992)

Before the court is plaintiffs' *fifth* motion to recuse this judge under Canon 3(E)(1) of the American Bar Association's Code of Judicial Conduct, 28 U.S.C. § 455, and the Fifth Amendment. The grounds alleged for recusal are the same grounds alleged and rejected on the four previous motions for recusal.

DISCUSSION

Title 28 U.S.C. § 455 provides in relevant part:

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party. . . .

Canon 3(E)(1) provides that:

> A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where . . .
>
> (1) the jury has a personal bias or prejudice concerning a party or a party's lawyer.

The test for recusal under both § 455(a) and Canon 3(e)(1) is "whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality." *McWhorter v. City of Birmingham*, 906 F.2d 674, 678 (11th Cir. 1990). The alleged bias or prejudice must stem from an extrajudicial source. *Jaffree v. Wallace*, 837 F.2d 1461, 1465 (11th Cir. 1988). As this court has previously determined, see Orders of January 17, 1990, January 30, 1990, May 23, 1990, and December 13, 1991, Nix has failed to demonstrate any extrajudicial bias on the part of this judge.[1] Nor has Nix raised any new allegations in his latest motion to recuse this judge. This court does not have, with due respect to Mr. Nix's demands, a duty to reconsider the same allegations over and over again.

Furthermore, this court's rulings in the four previous recusal motions are insufficient to justify recusal. *Jaffe v. Grant*, 793 F.2d 1182, 1189 (11th Cir. 1986), *cert. denied*, 480 U.S. 931 (1987).

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[1] In addition, the Eleventh Circuit has denied Nix's petition for writ of mandamus and prohibition seeking recusal of this judge in the instant action. No. 90-8561 (June 25, 1990).

Finally, the alleged bias or prejudice must be against the party, not against the attorney or attorney-in-fact for the party. See, e.g., *In re Cooper*, 821 F.2d 833, 838-39 (1st Cir. 1987); *United States v. Burt*, 765 F.2d 1364, 1368 (8th Cir. 1985). In rare circumstances, however, the bias against an attorney is so virulent that the judge's impartiality toward that attorney's client may reasonably be questioned. Id. Such is not the case here. This judge reiterates that he harbors no bias or prejudice against Mr. Nix or his clients.

With respect to plaintiffs' Fifth Amendment claim, "it would be anomalous to hold that a claim under [sections 455 and 144] insufficient on its merits could nevertheless satisfy the constitutional standard." *In re IBM Corp.*, 618 F.2d 923, 932 n.11 (2nd Cir. 1980). Therefore, this court's rejection of plaintiffs' claims under section 455 "*a fortiori* defeats [their] due process allegations." Id.

For the reasons set forth above, the court concludes that a reasonable person who knows all the facts would not find that this judge's impartiality might reasonably be questioned. Consequently, plaintiffs' motion to recuse this judge is hereby DENIED.

The court finds that this fifth motion to recuse has risen to the level of harassment. Nix has thirty days to show cause in writing why the court should not impose Rule 11 sanctions.

So ORDERED, this 5th day of June, 1992.

/s/ Wilbur D. Owens, Jr.
WILBUR D. OWENS, JR.,
UNITED STATES DISTRICT JUDGE

CL:lab

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

CURTIS CHEEVES, et al., Plaintiffs,	:	
vs.	:	C.A. 86-43-1-MAC (WDO)
SOUTHERN CLAYS, INC., et al., Defendants.	:	
THEODORE GIBSON, et al., Plaintiffs,	:	C.A. 86-44-2-MAC (WDO)
vs.	:	
SOUTHERN CLAYS, INC., et al., Defendants.	:	

ORDER

(Filed Sept. 14, 1993)

Before the court are four motions for summary judgment. Plaintiffs have filed three motions, including, a cross motion for summary judgment, a motion for summary judgment as to liability for fraud against defendants, and a motion for summary judgment against the Rhode Island Charities Trust as to liability for any judgment entered against defendant Southern Clays, Inc. Defendants have filed one motion renewing an earlier motion for summary judgment. After careful consideration of the arguments of counsel, the relevant case law, and the record as a whole, the court issues the following order.

FACTS

I. Cheeves

On January 30, 1935, a predecessor of defendant Southern Clays, Inc. ("Southern") obtained a mineral lease from Hattie Cheeves and seven of her nine children concerning two hundred acres of property lying in Washington County, Georgia. The lease obtained by Southern required Southern to pay a minimum annual royalty and a per ton royalty on all kaolin removed from the property.

In early 1954, Hattie Cheeves, Mary Cheeves Trawick, and John Cheeves approached Southern about the possible purchase by Southern of the Washington County property. After prospecting the property in August of 1954, Southern entered into negotiations for the purchase of the land. Through its prospecting, Southern had determined that the property might yield four million tons of finished clay. In October 1954, Southern purchased the Washington County property from Hattie Cheeves, several of her children, and several of her grandchildren for $35,000, or $150.00 per acre. In 1963, Southern leased the property to Freeport Sulfur Company for 99 years. Freeport actually mined the Washington County property from 1979 until 1987, recovering only 522,000 finished tons before ceasing operations at the site.

II. Gibson

In 1946, a predecessor to Southern obtained a mineral lease on 130 acres of property located in Wilkinson County, Georgia. The property was jointly owned by Griffin Gibson, Lillian Gibson Francis, and Richard

Shinholster. Only Griffin Gibson and Lillian Gibson Francis actually signed the mineral lease. After the death of Lillian Gibson Francis in 1947, her share of the property passed in equal shares to Griffin Gibson and Richard Shinholster.

In 1962, Southern approached Griffin Gibson about the possible purchase of the Wilkinson County property. Gibson refused to sell the property until after the property had been prospected.[1] In March of 1962, Southern prospected the property. In May and June of 1962, Southern purchased the Wilkinson County property from Griffin Gibson and Richard Shinholster for a total of $40,000, or $307.00 per acre. In 1963, Southern sold its interest in the Wilkinson County property, along with its interest in 29 other properties, to Freeport Sulfur Company for $993,730.00.[2]

In 1985, Robert Lee Watkins, an "investigator," approached plaintiffs about the Washington County and Wilkinson County properties. (Willie Gibson Dep. at 18); (Ethel Wilson Dep. at 30-31.) Watkins told plaintiffs that the prices received by plaintiffs and their predecessors were far lower than the true value of the properties. *Id.* Watkins subsequently obtained permission to sue in

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[1] Both Gibson and Richard Shinholster had previously worked for Southern. In fact, Gibson had at one time worked on a prospecting crew.

[2] As pointed out by defendants, Southern received approximately $33,124.00 per property, or approximately $300.00 per acre, in the sale to Freeport.

plaintiffs' name to obtain relief on the alleged fraudulent sales that took place in 1954 and 1962.[3]

DISCUSSION

On December 17, 1986, this court entered an order in *Gibson v. Southern Clays, Inc.*, Civil Action No. 86-44-2-MAC(WDO), granting defendants' motion for summary judgment as to counts two, three, and five of plaintiffs' complaint. The court granted the motion as to the three counts on the basis that the action was barred by the applicable four-year statute of limitations. The court declined to address defendants' motion for summary judgment as to counts one and four because defendants' motion was premature at that time. Accordingly, the court reserved judgment on whether counts one and four of plaintiffs' complaint were barred by the applicable statute of limitations until the completion of discovery.

On September 22, 1988, this court consolidated the action in *Gibson* with the action in *Cheeves v. Southern Clays, Inc.*, Civil Action No. 86-43-1-MAC(WDO). By reason of this consolidation, the disposition of the claim in *Cheeves* was made subject to the 1986 order entered in *Gibson*. Therefore, since the complaints in both cases present essentially the same causes of actions[4], the court's discussion will concern only counts one and four of the

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[3] One plaintiff, Ethel Wilson, did not enter into an agreement with Watkins and subsequently obtained her own counsel.

[4] The *Cheeves* complaint did present two additional counts: mistake and equitable accounting. These counts are included within the court's discussion.

Gibson complaint, and counts one, four, six and seven of the *Cheeves* complaint.

As noted above, in 1986 the court reserved judgment on whether the four-year statute of limitations barred plaintiffs' claims under counts one and four. Because of the extensive discovery conducted since that order, the court now addresses the question reserved in the 1986 order.[5]

I. Statute of Limitations

The Official Code of Georgia Annotated ("O.C.G.A.") provides two periods of limitation that may be applicable to plaintiffs' cause of action. *See* O.C.G.A. § 9-3-30 (1982) (four-year statute of limitations for trespass or damage to realty); O.C.G.A. § 9-3-31 (1982) (four-year statute of limitations for injuries to personality). Since both sections contain four-year statute of limitations, it is unnecessary to choose from between the two periods.

As noted by the court in 1986, plaintiffs' cause of action in the *Gibson* case accrued in 1962, the date the land transaction took place. Accordingly, plaintiffs' cause of action in the *Cheeves* case is also deemed to have accrued on the date of the land transaction at issue – 1954. Since the actions in *Gibson* and *Cheeves* were not instituted until 1986, plaintiffs' claims are facially barred by the four-year statute of limitations.

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[5] And further, whether the statute of limitations bars counts six and seven of the *Cheeves* complaint.

Plaintiffs maintain, however, that O.C.G.A. § 9-3-96 tolled the applicable statute of limitations until defendants' fraud was discovered in 1985. *See* O.C.G.A. § 9-30-96 (1982). Section 9-3-96 reads:

> If the defendant or those under whom he claims are guilty of a fraud by which the plaintiff has been debarred or deterred from bringing an action, the period of limitation shall run only from the time of the plaintiff's discovery of the fraud.

Id. In order for section 9-3-96 to be applicable, a plaintiff must show:

> (1) *actual fraud* on the part of the defendant involving moral turpitude, (2) which conceals the existence of a cause of action from the plaintiff, and (3) plaintiff's *reasonable diligence* in discovering his cause of action despite his failure to do so within the time of the applicable statute of limitations.

Jim Walter Corp. v. Ward, 245 Ga. 355, 357, 265 S.E. 2d 7, 9 (1980). " 'If facts do exist which would toll the statute of limitations, the [plaintiff] has the burden of setting forth and supporting these facts. . . . ' " *Edmonds v. Bates*, 178 Ga. App. 69, 72, 342 S.E.2d 476, 479 (1986) (quoting *Wade v. Thomasville Orthopedic Clinic*, 167 Ga. App. 278, 281, 306 S.E.2d 366, 368 (1983)).

A. Actual Fraud

To toll the applicable statute of limitations under O.C.G.A. § 9-3-96 and the decision in *Ward*, plaintiffs must first show "actual fraud on the part of the defendant involving moral turpitude. . . . " *Ward*, 245 Ga. at

357. In *McLendon v. Georgia Kaolin Co.*, 782 F.Supp. 1548 (M.D. Ga. 1992), this court held that to establish a prima facie case of fraud, plaintiffs must prove the following elements:

> 1) That defendant made a false representation of a material fact or concealed a material fact when under a duty to disclose;
>
> 2) That defendant knew the representation to be false or omission to be true when he made it;
>
> 3) That defendant made the representation or omission with the intent and purpose of deceiving plaintiff;
>
> 4) That plaintiff relied on the representation or omission;
>
> 5) That plaintiff suffered an injury as a result of such reliance.

McLendon, 782 F. Supp. at 1559; *see also Hubbard v. Stewart*, 651 F. Supp. 294, 298 (M.D. Ga. 1987) *and McLendon v. Galloway*, 216 Ga. 261, 263, 116 S.E. 2d 208, 210 (1960).

Plaintiffs contend that the material facts at issue in this case concern the quantity, quality and commercial value of the kaolin reserves located on the properties in Washington County and Wilkinson County. In plaintiffs' brief in support of their motion for summary judgment as to liability for fraud against defendants, plaintiffs concede that defendants never represented to any plaintiff the quantity, quality or commercial value of the kaolin

reserves. (Pls.' Br. at 14-18, 32-34.)[6] Accordingly, plaintiffs' claim must rest on the concept of fraudulent concealment.

In order to establish a claim of fraudulent concealment, plaintiffs must first prove that defendants "concealed a material fact when under a duty to disclose." *McLendon*, 782 F. Supp. at 1559; *see* O.C.G.A. § 23-2-53 (1982). "The obligation to communicate may arise from the confidential relations of the parties or from the particular circumstances of the case." O.C.G.A. § 23-2-53.

Plaintiffs argue that the tenancy-in-common created by the land transactions in 1954 and 1962, and the prior mineral leases, created a confidential relationship between the parties. The question as to whether a tenancy-in-common establishes a confidential relationship was addressed by this court in *McLendon*. In *McLendon*, this court held that although tenants in common "are in a

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[6] Paragraph 39 of plaintiffs' statement of undisputed material facts reads: "[N]ot a single document contains any suggestion, much less competent evidence, that *any* disclosure of quantity, quality and commercial value information was made to *any* of the Cheeves plaintiff-grantors either before or at any time after any of the purchases were consummated." (Pls.' Brief at 17 ¶39.) Further, paragraph 83 states: "[D]efendants have not produced one shred of competent, admissible evidence proving *any* disclosure to either Richard Shinholster or Griffin Gibson of the quantity, quality, and commercial value information. . . . " (Pls.' Brief at 33 ¶83.) These are only two short examples of approximately eight pages in plaintiffs' brief in which plaintiffs state again and again that defendants failed to make any disclosure concerning any of the material facts at issue in this case.

confidential relationship with each other as to the common estate[,] . . . no Georgia case extends this relationship to encompass the circumstance of one tenant purchasing another cotenant's interest." *McLendon*, 782 F. Supp. at 1562. This court noted that the confidential relationship that exists between cotenants deals "only with the situation in which a cotenant purchases an adverse claim to the common estate and then asserts that claim for his own benefit." *Id.* n. 27. Therefore, when a tenant attempts to purchase a fellow cotenant's interest, the parties operate at arms length.[7]

Plaintiffs, however, also maintain that a duty to disclose exists by virtue of the "particular circumstances" of the case. *See* O.C.G.A. § 23-2-53. Because defendants had information as to the quantity, quality and commercial value of the kaolin reserves, and because plaintiffs had no means by which to acquire this information in the absence of extraordinary diligence, plaintiffs contend that defendants were under a duty to reveal this information. Plaintiffs have cited this court to a number of Georgia cases that allegedly support their proposition. *See Holman v. Ruesken*, 246 Ga. 557, 272 S.E. 2d 292 (1980); *Wilhite v. Mays*, 239 Ga. 31, 235 S.E. 2d 532 (1977); *Daugert v. Holland Furnace Co.*, 107 Ga. App. 566, 130 S.E. 2d 763 (1963). In each case, however, it is the *buyer* bringing suit against

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[7] Plaintiffs assert that under O.C.G.A. § 23-2-58, defendants are also in a confidential relationship with plaintiffs because defendants "exercise a controlling influence over the will, conduct, and interest of another. . . . " O.C.G.A. § 23-2-58 (1982). This argument, however, is merely a restatement of plaintiffs contention that as tenants in common a confidential relationship exists between the parties.

the seller for failure to disclose information about the subject matter of the sale, not the seller suing the buyer. The general rule in Georgia is caveat emptor. *See Wilhite*, 239 Ga. at 31. An exception to this rule exists when the *seller* has " 'special knowledge not apparent to the buyer and is aware that the *buyer* is acting under a misapprehension as to facts that would be important to the buyer and would probably affect its decision." *Id.* (emphasis added). No Georgia case has extended this duty to disclose to a buyer with superior knowledge. To transpose the doctrine of passive concealment in this manner would completely alter the relationship of buyers and sellers under Georgia law. In the absence of a confidential relationship, this court will not impose upon the buyer a duty to disclose. Plaintiffs, therefore, have failed to establish a prima facie case for actual fraud.[8]

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[8] Although the failure of plaintiffs to establish a duty to disclose effectively ends the inquiry, plaintiffs have also failed to produce any evidence that they suffered an injury as a result of the alleged fraud. Plaintiffs have produced ample evidence of the value of the leasehold interests that could have been obtained under optimal conditions in 1954 and 1962. Defendants, however, purchased the land on per acreage basis. Plaintiffs have offered absolutely no evidence that the value plaintiffs received on a per acreage basis was unreasonable. Plaintiffs have attempted to use a per ton royalty calculation to determine the reasonable value of the property. Plaintiffs, however, have shown this court no evidence to indicate that a per ton royalty calculation is in any manner related to the determination of a reasonable per acreage value.

B. Reasonable Diligence

Even if the court were to find that the first two elements of section 9-3-96 have been met, plaintiffs have still failed to produce any evidence that they were reasonably diligent in discovering their cause of action. Plaintiffs contend that they were excused from the requirement of "reasonable diligence" by virtue of their confidential relationship with defendants. *See Shipman v. Horizon Corp.*, 245 Ga. 808, 809, 267 S.E. 2d 244, 246 (1980) ("Failure to exercise reasonable diligence to discover the fraud may be excused where a relationship of trust and confidence exists between the parties"). However, as discussed *supra*, no confidential relationship existed between the parties as to the sale of the Gibson and Cheeves properties. The parties operated at arms length. Accordingly, plaintiffs were not excused from the requirement of "reasonable diligence."

Plaintiffs have failed to offer any evidence that they exercised reasonable diligence in discovering the alleged fraudulent sale. In fact, until approached by Robert Lee Watkins in 1985, not one plaintiff inquired in any manner as to quantity, quality, or commercial value of the kaolin reserves.[9] The question as to whether a plaintiff has exercised reasonable diligence is ordinarily one for the jury.

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[9] In the absence of a duty to disclose on the part of defendants, plaintiffs cannot avail themselves of the argument that their lack of knowledge as to the fraudulent nature of the sales tolled the statute of limitations. "Mere ignorance of fraud which, by the use of ordinary diligence, might have been discovered in due time will not suspend the operation of the statute of limitations." *Morris v. Johnstone*, 172 Ga. 598, 606, 158 S.E. 308 (1931).

Jim Walter, 245 Ga. at 357. However, in the absence of any evidence from which a jury could infer reasonable diligence on the part of the plaintiffs, this court finds that the plaintiffs have not met their burden for tolling the statute of limitations.

Therefore, because plaintiffs have failed to establish that the applicable four-year statute of limitations was tolled by O.C.G.A. § 9-3-96, defendants' motion for summary judgment on all claims is **GRANTED**.

II. Motion for Reconsideration

Plaintiffs have also moved this court to reconsider its summary judgment order of December 17, 1986. The court **DENIES** plaintiffs' motion for reconsideration.

CONCLUSION

The court finds that plaintiffs' cause of action was not tolled by O.C.G.A. § 9-3-96. Accordingly, plaintiffs claims are barred by the applicable four-year statute of limitations. Therefore, the motion for summary judgment filed by defendants is **GRANTED** on all claims. Further, plaintiffs' motion that the court reconsider its summary judgment order of December 17, 1986 is **DENIED**.

SO ORDERED, this 14th day of September, 1993.

/s/ Wilbur D. Owens, Jr.
WILBUR D. OWENS, JR.,
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-8071

D.C. Docket Nos. CV86-43-1-MAC
CV86-44-2-MAC(WDO)

CURTIS CHEEVES, et al.,

Plaintiffs-Appellants,

versus

SOUTHERN CLAYS, INC., et al.,

Defendants-Appellees.

THEODORE GIBSON, et al.,

Plaintiffs-Appellants,

versus

SOUTHERN CLAYS, INC., et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Georgia

(October 24, 1994)

Before KRAVITCH and DUBINA, Circuit Judges, and GIBSON* Senior Circuit Judge.

PER CURIAM:

AFFIRMED: *See* 11th Cir. R. 36-1.

---

* Honorable Floyd R. Gibson, Senior U. S. Circuit Judge for the Eighth Circuit, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-8071

CURTIS CHEEVES, et al.,

Plaintiffs-Appellants,

versus

SOUTHERN CLAYS, INC., et al.,

Defendants-Appellees.

THEODORE GIBSON, et al.,

Plaintiffs-Appellants,

versus

SOUTHERN CLAYS, INC., et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Georgia

ON PETITION(S) FOR REHEARING

(Filed Dec. 16, 1994)

BEFORE: KRAVITCH and DUBINA, CIRCUIT JUDGES, and GIBSON*, Senior Circuit Judge.

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* Honorable Floyd R. Gibson, Senior U. S. Circuit Judge for the Eighth Circuit, sitting by designation.

BEFORE:

PER CURIAM:

The petition(s) for rehearing filed by Appellants is denied.

/s/ Joel F. Dubina
UNITED STATES
CIRCUIT JUDGE

Supreme Court, U.S.
FILED
APR 17 1995
OFFICE OF THE CLERK

No. 94-1540

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

CURTIS CHEEVES & THEODORE GIBSON, *et al.*,
Petitioners,

v.

SOUTHERN CLAYS, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF IN OPPOSITION

FRANK C. JONES
Counsel of Record
RALPH A. PITTS
RICHARD A. SCHNEIDER
JAMES W. BOSWELL
KING & SPALDING
191 Peachtree Street, N.E.
Atlanta, Georgia 30303
(404) 572-4600
Counsel for Respondents

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Is this petition for certiorari barred because petitioners explicitly omitted from their Notice of Appeal the orders concerning recusal of the district judge that they now seek to have reviewed on certiorari?

2. In its summary affirmance, did the Court of Appeals properly reject the petitioners' allegation that the district court was somehow biased against petitioners' counsel and should be recused, where the district court never displayed any appearance of partiality or antagonism against petitioners' counsel during the proceedings in these cases?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
A. Overview	1
B. Procedural History	3
REASONS FOR DENYING THE WRIT	9
I. THE CHALLENGED RECUSAL ORDERS WERE NOT PROPERLY APPEALED	9
II. THE ISSUE ON WHICH PETITIONERS SEEK REVIEW IN THIS COURT WAS NOT PRESENTED TO THE ELEVENTH CIRCUIT	10
III. THE DISTRICT COURT'S LEGAL RULING CANNOT BE ASCRIBED TO BIAS OR PARTIALITY BECAUSE IT IS CONSISTENT WITH AND CONTROLLED BY PRECEDENTS HANDED DOWN BY OTHER COURTS, NONE OF WHICH IS CLAIMED TO BE BIASED	11
IV. THERE WAS NO APPEARANCE OF BIAS OR PREJUDICE AGAINST PETITIONERS' COUNSEL, AND THE STANDARDS WHICH THE DISTRICT COURT APPLIED WERE APPROPRIATE AND HAVE NOT BEEN THE SUBJECT OF A DIVISION IN THE CIRCUITS	13
CONCLUSION	19
APPENDIX:	
Opinion of the United States Court of Appeals for the Eleventh Circuit in *In re Gibson*, No. 90-8561, Filed June 25, 1990	1a

TABLE OF CONTENTS—Continued

Page

Opinion of the United States Court of Appeals for the Eleventh Circuit in *United States v. Watkins*, No. 90-8317, Filed Dec. 7, 1990 ..... 2a

Opinion of the United States Court of Appeals for the Eleventh Circuit in *In re Watkins*, No. 92-8554, Filed June 26, 1992 ..... 4a

Opinion and Order of Judge Hodges Assessing Sanctions Against Franklin R. Nix Pursuant to Fed. R. Civ. P. 11, Filed Oct. 30, 1992 ..... 5a

TABLE OF AUTHORITIES

Cases: Page

In re Beard, 811 F.2d 818 (4th Cir. 1987) 17
Butts v. Southern Clays, Inc., 450 S.E.2d 244 (Ga. App. 1994), *cert. denied* (No. S95C0357) (Ga. Feb. 20, 1995) 3, 8, 12, 13
Chaka v. Lane, 894 F.2d 923 (7th Cir. 1990) 10
Cheeves v. Southern Clays, Inc., 113 S. Ct. 815 (1992) 2, 6
Cheeves v. Southern Clays, Inc., 39 F.3d 326 (11th Cir. 1994) 2, 8
Cheeves v. Southern Clays, Inc., 797 F. Supp. 1570 (M.D. Ga. 1992) 2, 4, 5, 6
Cheeves v. Southern Clays, Inc., No. 86-43-1-MAC (WDO) (M.D. Ga. Oct. 30, 1992) 2, 7
In re Cheeves, 113 S. Ct. 832 (1992) 2, 6
In re Cooper, 821 F.2d 833 (1st Cir. 1987) 17
Davis v. Board of School Comm'rs, 517 F.2d 1044 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976) 16, 17, 18
Diversified Numismatics, Inc. v. City of Orlando, 949 F.2d 382 (11th Cir. 1991) 16, 18
EEOC v. FLRA, 476 U.S. 19 (1986) 11
Ennis v. Freeport Kaolin Co., No. 85-17-2-MAC (M.D. Ga. June 30, 1987), *aff'd*, 838 F.2d 1220 (11th Cir. 1988) 13
In re Gibson, No. 90-8561 (11th Cir. June 25, 1990) 2, 4
In re IBM Corp., 618 F.2d 923 (2d Cir. 1980) 17
Liteky v. United States, 114 S. Ct. 1147 (1994) 14
McLendon v. Georgia Kaolin Co., 782 F. Supp. 1548 (M.D. Ga. 1992) 12-13
Pitney Bowes, Inc. v. Mostre, 701 F.2d 1365 (11th Cir.), *cert. denied*, 464 U.S. 893 (1983) 10
Souder v. Owens-Corning Fiberglas Corp., 939 F.2d 647 (8th Cir. 1991) 17, 18
Travelers Ins. Co. v. Liljeberg Enters., Inc., 38 F.3d 1404 (5th Cir. 1994) 18
United States v. Burt, 765 F.2d 1364 (9th Cir. 1985) 18

TABLE OF AUTHORITIES—Continued

Page

United States v. Ritter, 540 F.2d 459 (10th Cir.), *cert. denied sub nom. Olson Farms, Inc. v. United States*, 429 U.S. 951 (1976) 18
United States v. Watkins, 921 F.2d 285 (11th Cir. 1990) 2, 4, 5
Watkins v. United States, 502 U.S. 922 (1991) 2, 5
In re Watkins, No. 92-8554 (11th Cir. June 26, 1992) 2, 6
Wilson v. Firestone Tire & Rubber Co., 932 F.2d 510 (6th Cir. 1991) 10
In re Winslow, 107 B.R. 752 (D. Colo. 1989) 14

Statutes Cited:

28 U.S.C. § 144 ..... 10, 15, 16, 17
28 U.S.C. § 372 5
28 U.S.C. § 455 ..... 8, 10, 11, 15, 16, 17

Rules Cited:

Supreme Court Rules:
Rule 10 9

Other Authority Cited:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1540

CURTIS CHEEVES & THEODORE GIBSON, *et al.*,
Petitioners,

v.

SOUTHERN CLAYS, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. Overview

The actions before this Court are two consolidated diversity cases filed in 1986 involving claims that respondents failed to make certain disclosures in connection with purchases of property in 1954 and 1962.* The district court entered summary judgment against petitioners, holding, among other things, that their claims were barred by the applicable four-year Georgia statute of limitations because they were brought more than 20 years after the events in question. This summary judgment was based entirely upon state law. The United States Court of Appeals for the Eleventh Circuit has now issued a summary *per curiam* affirmance of the summary

* In compliance with this Court's Rule 29.1, respondents note that respondent Southern Clays, Inc. no longer exists and, while it existed, had no parent companies or subsidiaries. Respondent The Rhode Island Charities Trust has no parent companies or subsidiaries.

judgment in favor of respondents. Given these circumstances, there is no issue in this case worthy of this Court's consideration on certiorari.

Nevertheless, in attempting to obtain review by this Court, petitioners raise an issue concerning their repeated efforts to recuse the district judge in these cases. This very issue of petitioners' efforts to recuse the district judge has been the focus of two prior petitions for certiorari to this Court, both of which were denied. *Cheeves v. Southern Clays, Inc.*, 113 S. Ct. 815 (1992); *Watkins v. United States*, 502 U.S. 922 (1991); *see In re Cheeves*, 113 S. Ct. 832 (1992) (denial of mandamus petition). Respondents respectfully submit that the issue of recusal, which has been rejected seven times in the district court, four times by the Eleventh Circuit Court of Appeals, and twice by this Court, does not merit review. *See Cheeves v. Southern Clays, Inc.*, 797 F. Supp. 1570, 1584 (M.D. Ga. 1992) (describing seven motions); *In re Gibson*, No. 90-8561 (11th Cir. June 25, 1990) (denial of writ of mandamus); *United States v. Watkins*, 921 F.2d 285 (11th Cir. 1990) (table case); *Watkins v. United States*, 502 U.S. 922 (1991); *Cheeves v. Southern Clays, Inc.*, No. 86-43-1-MAC (WDO) (M.D. Ga. Oct. 30, 1992); *In re Watkins*, No. 92-8554 (11th Cir. June 26, 1992) (denial of writ of mandamus); *Cheeves v. Southern Clays, Inc.*, 113 S. Ct. 815 (1992); *Cheeves v. Southern Clays, Inc.*, 39 F.3d 326 (11th Cir. 1994) (summary affirmance), *petition for cert. filed* (U.S. March 16, 1995) (No. 94-1540).

Moreover, the recusal orders that petitioners challenge here were explicitly omitted from petitioners' otherwise highly specific Notice of Appeal. In light of this, respondents alerted the Court of Appeals to its lack of jurisdiction since the recusal orders were not included in a timely Notice of Appeal. The Court of Appeals did not explicitly rule on this point and issued only a summary affirmance. Respondents again point out the jurisdictional defect here, as an additional reason for denying certiorari.

B. Procedural History

The history of petitioners' recusal campaign, as relevant to this petition for certiorari, can be briefly summarized.[1] Petitioners and/or their counsel (Mr. Nix) moved to recuse the district judge—Chief Judge Wilbur D. Owens—seven times, with all of the motions arising out of the same core facts. Five of the motions were filed in the *Cheeves* and *Gibson* cases now before this Court, and two of the motions were filed in a criminal case then pending before Judge Owens. All of the motions arose out of petitioners' allegations concerning a conference that Chief Judge Owens had with another judge in his district, Judge Duross Fitzpatrick, concerning a man named Robert Lee Watkins.

Robert Lee Watkins is a non-lawyer, who was instrumental in causing the *Cheeves* and *Gibson* petitioners to file their claims against respondents. Robert Lee Watkins himself was not and is not a party to these cases. He served as a non-party, self-styled "investigator" and "attorney-in-fact" for petitioners. Mr. Watkins was to receive a contingency fee if petitioners were successful in these cases.

In addition to his involvement in the *Cheeves* and *Gibson* cases, Mr. Watkins was also involved in another similar case against different defendants pending before Judge Fitzpatrick. In that case, Judge Fitzpatrick received evidence indicating to him that Mr. Watkins had suborned perjury in the case by causing a witness to fab-

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[1] The petition for certiorari purports to recount various facts concerning not only the recusal issue but also the merits of the cases. This brief in opposition is not the place to debate petitioners' allegations on the merits. The more important point is that petitioners' allegations on the merits are just that—allegations—not supported by evidence; as a matter of law, respondents did not engage in any fraudulent or unconscionable act, as not only the district court found, but the Georgia Court of Appeals found separately in *Butts v. Southern Clays Inc.*, 450 S.E.2d 244 (Ga. App. 1994).

ricate testimony in a deposition. Because Judge Fitzpatrick was presiding over a case involving Mr. Watkins and because he suspected Mr. Watkins of wrongdoing, Judge Fitzpatrick went to Judge Owens, in his capacity as Chief Judge of the Middle District of Georgia, for Judge Owens' guidance on how Judge Fitzpatrick should handle the case before him. Judge Fitzpatrick and Judge Owens had a conference on the subject.

In the conference between the two judges, Judge Fitzpatrick informed Judge Owens, as Chief Judge of the Middle District of Georgia, of his belief that Mr. Watkins had suborned perjury in a case pending before Judge Fitzpatrick. *See United States v. Watkins*, No. 90-8317 (11th Cir. Dec. 7, 1990), included in the Appendix to this brief at 2a. After the conference, Judge Fitzpatrick stayed the case before him involving Mr. Watkins and referred the incident concerning Mr. Watkins to the United States Attorney in Macon. Mr. Watkins was later indicted and a criminal case was filed against him. The criminal case was assigned to Judge Owens.

In the wake of these events, petitioners began seeking to recuse Judge Owens from the *Cheeves* and *Gibson* cases, claiming that Judge Owens' conference with Judge Fitzpatrick gave rise to a potential for bias or partiality against Mr. Watkins, and thus a potential for bias against petitioners because Mr. Watkins was their attorney-in-fact and investigator. Judge Owens subsequently rejected the first three such motions for recusal in the *Cheeves* and *Gibson* cases, ruling, among other things, that a conference concerning the administration of the court between two judges does not constitute an extrajudicial event, which is the kind of event necessary to support a claim of an appearance of bias or prejudice. *See* 797 F. Supp. at 1577. Petitioners responded to these rulings by seeking mandamus relief in the Eleventh Circuit, which was denied. *In re Gibson*, 90-8561 (11th Cir. June 25, 1990), included in the Appendix to this brief at 1a.

Contemporaneously with these events in the *Cheeves* and *Gibson* cases, related events were occurring in the *Watkins* criminal case pending before Judge Owens. Watkins and his counsel (Mr. Nix, who also served as petitioners' counsel in the *Cheeves* and *Gibson* cases) filed two motions making the same recusal argument made in *Cheeves* and *Gibson*. Judge Owens made similar rulings rejecting them. *See* 797 F. Supp. at 1575-77. Watkins was subsequently tried and convicted by a jury.

Watkins appealed his conviction, as well as the recusal rulings, to the Eleventh Circuit. The Eleventh Circuit expressly rejected the recusal challenge and held that the Judge Owens-Judge Fitzpatrick conference was not grounds for recusal as a matter of law:

> [A]ny information conveyed at the alleged conference was received by the district judge, *i.e.*, the chief judge, in his judicial capacity and not in an extrajudicial capacity. Moreover, nothing in the information which could reasonably have been received by the district judge would indicate disqualifying bias on the part of [Judge Owens].

3a. After the Eleventh Circuit rejected his appeal, Mr. Watkins petitioned this Court for a writ of certiorari to review the decision of the Eleventh Circuit on the recusal issue. This Court denied certiorari, *Watkins v. United States*, 502 U.S. 922 (1991), rendering the Eleventh Circuit's decision of this issue final.

While the *United States v. Watkins* matter was being pursued through the appellate process, Mr. Nix, acting as counsel for petitioners and Watkins, filed judicial misconduct charges relating to the Judge Owens-Judge Fitzpatrick conference against Judge Owens with the Eleventh Circuit Judicial Council pursuant to 28 U.S.C. § 372(c). In the *Cheeves* and *Gibson* cases, petitioners subsequently filed a fourth motion to recuse Judge Owens on the grounds that Judge Owens must now have become biased against *counsel* because counsel had made so many allega-

tions of wrongdoing against Judge Owens. *See* 797 F. Supp. at 1578. That fourth motion for recusal was also denied.

Petitioners then prepared to file a fifth motion for recusal in the *Cheeves* and *Gibson* cases and sought to take the deposition of Judge Owens and the other two district judges in the Middle District of Georgia. Judge W. Terrell Hodges of the Middle District of Florida was then temporarily assigned by the Eleventh Circuit to decide petitioners' motions to depose the judges. Judge Hodges later ruled that the Judges could not be deposed under the circumstances. *Cheeves v. Southern Clays, Inc.*, 797 F. Supp. 1570 (M.D. Ga. 1992).

While the deposition issue was pending, petitioners filed the referenced fifth motion for recusal. Judge Owens subsequently rejected that fifth motion and stated:

> The Court finds that this fifth motion to recuse has risen to the level of harassment. Nix [petitioner's counsel] has thirty days to show cause in writing why the Court should not impose Rule 11 sanctions.

Pet. App. 6.[2] Following Judge Owens' Order suggesting a Rule 11 violation, Judge Hodges was again temporarily assigned to the Middle District of Georgia to decide the Rule 11 issue.

In the interim, petitioners sought and were denied mandamus relief on the issue of Judge Owens' rejection of the fifth motion for recusal. *In re Watkins*, No. 92-8554 (11th Cir. June 26, 1992), included in the Appendix to this brief at 4a. Following that denial of mandamus by the Eleventh Circuit, petitioners petitioned for writs of certiorari, mandamus and prohibition to this Court, all of which was denied on December 14, 1992. *Cheeves v. Southern Clays, Inc.*, 113 S. Ct. 815 (1992); *In re Cheeves*, 113 S. Ct. 832 (1992). The rejected petitions for writs of certiorari, mandamus and prohibition

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[2] Citations to "Pet. App." are to the Appendix to the Petition for Certiorari.

alleged that Judge Owens was biased against counsel (Mr. Nix), and quoted from the same judicial misconduct proceedings that plaintiffs quote from in their instant petition for certiorari as grounds for review.

While petitioners' 1992 petitions for certiorari, mandamus and prohibition were pending in this Court, Judge Hodges issued his ruling on the Rule 11 issue, holding that petitioners' counsel had violated Rule 11. A copy of Judge Hodges' opinion is included in the Appendix to this brief at 5a. Judge Hodges fined petitioners' counsel, finding that "no reasonable lawyer . . . would have filed the last two motions [for recusal] after the Court of Appeals decisions." 14a.[3]

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[3] In deciding the Rule 11 issue, Judge Hodges specifically rejected the contention that petitioners' various recusal motions (including those filed in *United States v. Watkins*) were based on different grounds. Judge Hodges stated:

> All of the motions . . . and the orders denying them, shared two common features which [petitioners' counsel] simply chose to ignore. First, all of the motions asserted and reasserted the same ultimate basis, namely, that Chief Judge Owens had apparently engaged in so-called *ex parte* discussions or communications with his colleague, Judge Fitzpatrick, concerning an act of subornation of perjury by Robert L. Watkins, the [petitioners'] agent, so that Chief Judge Owens' impartiality toward Watkins and the [petitioners] might reasonably be questioned.

10a. Judge Hodges also found all of the motions were premised on an argument that clearly lacked support under the disqualification statute:

> Secondly, the orders denying the motions—including the unpublished opinion of the Court of Appeals in the criminal case [*United States v. Watkins*]—consistently and repeatedly rejected disqualification of Chief Judge Owens on the ground that, at best, the motions demonstrated only a judicial rather than a personal bias, and only a personal bias warrants disqualification of a judicial officer under the statutes.

10a. Judge Hodges imposed sanctions in part because petitioners' counsel urged and re-urged a claim that "was repeatedly and correctly rejected as legally insufficient." 13a.

The recusal campaign came to an end at that point, and the parties renewed their cross motions for summary judgment on the merits, which had been filed in December 1990. By Order dated September 14, 1993, Judge Owens granted respondents' motions, holding, *inter alia*, that the applicable statute of limitations under Georgia law had run on petitioners' claims of nondisclosure in connection with respondents' purchase of kaolin lands from petitioners in 1954 and 1962.

Petitioners appealed Judge Owens' ruling on the merits to the Eleventh Circuit, which issued a summary affirmance of the judgment. *Cheeves v. Southern Clays, Inc.*, 39 F.3d 326 (11th Cir. 1994) (table case). The Eleventh Circuit's decision on the merits followed a state court decision by the Georgia Court of Appeals in a similar case, *Butts v. Southern Clays, Inc.*, 450 S.E.2d 244 (Ga. App. 1994), which established that a seller of real estate has no duty under Georgia law to disclose under the circumstances of these cases. Following the Eleventh Circuit's ruling, petitioners filed the instant petition for certiorari—not trying to demonstrate that the district court's decision on the merits is incorrect or contrary to controlling law—but instead challenging the recusal orders, even though those orders were explicitly omitted from petitioners' Notice of Appeal to the Eleventh Circuit.

In the pending petition for certiorari, petitioners argue that the district judge was biased against petitioners' counsel and should have recused himself on that basis under the appearance of impartiality standard set forth in 28 U.S.C. § 455(a). Petitioners essentially claim that the district court used the wrong standard in considering this issue. However, the record indicates that the district court considered petitioners' recusal motion both under the appearance of impartiality standard and under the standard of whether a virulent bias toward counsel had been shown. Pet. App. 5-6. Petitioners' recusal motion did not satisfy either standard. *Id.* Moreover, petitioners

never challenged the correctness of the standard applied by the district court in their appeal to the Eleventh Circuit. For these and the other reasons set forth below, respondents respectfully request that the petition for certiorari should be denied.

REASONS FOR DENYING THE WRIT

For the following reasons, respondents submit that the instant petition for certiorari plainly does not meet this Court's criteria for granting certiorari. *See* S. Ct. R. 10.

I. THE CHALLENGED RECUSAL ORDERS WERE NOT PROPERLY APPEALED.

In their Notice of Appeal to the Eleventh Circuit, petitioners specifically listed the orders and judgments appealed from, including the date of each order or judgment and the date of its entry on the docket sheet.[4] In addition, a copy of each order or judgment appealed from was attached to the Notice of Appeal. Petitioners did not list the recusal rulings among the orders or judgments being appealed and did not attach copies of those orders to the Notice of Appeal. Subsequently, after the time to appeal had expired, plaintiffs filed a Civil Appeal Form and attached to that form not only the three orders identified in the Notice of Appeal, but also two recusal orders that were not included in the Notice of Appeal. This

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[4] The Notice of Appeal listed the orders and judgments appealed from as follows:

(i) Order of September 14, 1993, entered on docket September 14, 1993;

(ii) Judgment of September 15, 1993, entered on docket on September 16, 1993, said Judgment being pursuant to the above-referenced Order of September 14, 1993, granting summary judgment in favor of Defendants; and

(iii) Order of December 17, 1993, entered on docket on December 17, 1993, denying Plaintiffs timely filed Motion to Alter, Amend, and Reconsider the above-referenced Order of September 14, 1993.

filing emphasizes that the recusal orders were explicitly omitted from the Notice of Appeal.

As a general rule, when an appellant appeals a final order, the appellant is automatically entitled to raise all prior orders entered in the case. However, when an appellant lists in a notice of appeal specific orders appealed from, rather than simply appealing from the final judgment, only the orders appealed from are subject to appeal. *See Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510, 516 (6th Cir. 1991) ("[i]f an appellant . . . chooses to designate specific determinations in his notice of appeal—rather than simply appealing from the entire judgment—only the specified issues may be raised on appeal") (ellipses in original) (citation omitted); *Pitney Bowes, Inc. v. Mestre*, 701 F.2d 1365, 1374 (11th Cir.) ("by specifically listing only the non-injunction issues, [appellant] indicated his intent *not* to appeal the injunction"), *cert. denied*, 464 U.S. 893 (1983); *see generally Chaka v. Lane*, 894 F.2d 923, 925 (7th Cir. 1990). Likewise, by failing to list the orders denying their motions to recuse in the Notice of Appeal while specifically listing the orders and judgments relating to summary judgment as to which an appeal was taken, petitioners limited their appeal to the summary judgment issues. The recusal issues should therefore be rejected because they are not supported by a timely and proper Notice of Appeal.

II. THE ISSUE ON WHICH PETITIONERS SEEK REVIEW IN THIS COURT WAS NOT PRESENTED TO THE ELEVENTH CIRCUIT.

Petitioners' statement of the issue before this Court is "whether disqualification for *extrajudicially* acquired appearances of partiality for or against *counsel* shall be governed by the general 'impartiality might reasonably be questioned' standard of Section 455(a), by the bias or prejudice standards of 28 U.S.C. §§ 144 and 455(b)(1) expressly applicable only to *parties*, or by the sundry

other standards . . . inconsistently applied by the Courts of Appeals." Petition at 3-4 (emphasis in Petition). Petitioners did not raise this issue in the Eleventh Circuit, however.

The disqualification issue that petitioners presented to the Eleventh Circuit was simply "whether the presiding District Judge abused his discretion in refusing to disqualify himself under 28 U.S.C. § 455." Brief of Appellant at 1. Petitioners simply asked the Eleventh Circuit to find that Judge Owens' refusal to recuse himself was a "clear error of judgment," principally because of his comments to the Special Committee appointed by Chief Judge Tjoflat to investigate charges of judicial misconduct. Petitioners never argued to the Eleventh Circuit that the district court applied the wrong legal standard in ruling on the recusal motions. They simply argued that the quantum of evidence of impartiality was such that Judge Owens committed a clear error of judgment in failing to recuse himself.

In an effort to seek review by this Court, petitioners have created a new issue regarding the standard governing counsel-based disqualification that was not presented to either court below. This Court, however, does not act as a Court of first resort to decide issues that were not previously presented to the Court of Appeals. *See EEOC v. FLRA*, 476 U.S. 19, 24 (1986) (*per curiam*). This is another reason to deny the writ.

III. THE DISTRICT COURT'S LEGAL RULING CANNOT BE ASCRIBED TO BIAS OR PARTIALITY BECAUSE IT IS CONSISTENT WITH AND CONTROLLED BY PRECEDENTS HANDED DOWN BY OTHER COURTS, NONE OF WHICH IS CLAIMED TO BE BIASED.

The implication of the petition for certiorari is that petitioners lost these cases on the merits because the district judge was allegedly biased. Yet, these cases turn on two central legal issues that have been dispositively

decided against petitioners by other courts not subject to the charge of bias, specifically, (1) whether there was a duty to disclose under Georgia law in the circumstances of these cases; and (2) whether the statute of limitations ran where plaintiffs exercised no diligence in pursuing the claims at issue. Both of these issues were decided against petitioners by other courts whose impartiality has not been questioned.

First, in *Butts v. Southern Clays, Inc.*, 450 S.E.2d 244 (Ga. App. 1994), *cert. denied* (No. S95C0357) (Ga. Feb. 20, 1995), the plaintiffs, like petitioners, sold property to a kaolin company knowing the land contained the mineral kaolin. *Id.* at 246. Based on an application of Georgia law, the Georgia Court of Appeals affirmed summary judgment for respondent Southern Clays, Inc., stating as follows:

> Under the facts of this case, plaintiffs are unable to meet their burden of establishing that Southern had a duty to disclose *any* information with regard to the kaolin reserves on plaintiffs' property absent an inquiry by plaintiffs. This is not a case where the plaintiffs did not know that their land contained kaolin prior to the sale. Plaintiffs knowingly sold their land for its kaolin content to a company that they knew was in a position to have superior knowledge regarding the quantity and quality of the reserves.

Id. at 247 (emphasis in original). The state court in *Butts*, like the district court here, held summary judgment appropriate because of plaintiffs' inability to demonstrate a duty on which to predicate a claim of actual fraud.[5] The *Butts* decision is a controlling Georgia decision on an issue of Georgia law that totally disposes of petitioners' claims on the merits.

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[5] The decision in *Butts* finding no duty to disclose where a seller knows that he is selling kaolin land to a kaolin company is completely consistent with the decision in *Cheeves* and *Gibson*, and also consistent with the decision in *McLendon v. Georgia Kaolin*

Similarly, the central statute of limitations issue in these cases was decided against petitioners by another court. In *Ennis v. Freeport Kaolin Co.*, No. 85-17-2-MAC (M.D. Ga. June 30, 1987), *aff'd*, 838 F.2d 1220 (11th Cir. 1988) (table case), the Eleventh Circuit affirmed summary judgment on the basis of the statute of limitations where the plaintiffs, like the petitioners here, exercised absolutely no diligence to ascertain the value of their land before selling it. In sum, petitioners lost these cases on the merits, not because the district court was biased, but because their claims were not supported by the law or the undisputed facts.

IV. THERE WAS NO APPEARANCE OF BIAS OR PREJUDICE AGAINST PETITIONERS' COUNSEL, AND THE STANDARDS WHICH THE DISTRICT COURT APPLIED WERE APPROPRIATE AND HAVE NOT BEEN THE SUBJECT OF A DIVISION IN THE CIRCUITS.

The thrust of the petition is that (a) the district court was biased or appeared to be biased against petitioners' counsel; (b) the district court used the wrong standard in deciding the effect of that bias; and (c) the circuits are divided over what standard to use when the alleged bias is against counsel, as opposed to the party itself. Petitioners are wrong on all counts.

The claim that Judge Owens was biased against Mr. Nix is premised on the assertions that (1) Judge Owens must have been biased against counsel because counsel accused Judge Owens of judicial misconduct; (2) Judge

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Co., 782 F. Supp. 1548 (M.D. Ga. 1992). Petitioners claim that Judge Owens' decision in *McLendon* is inconsistent with his decision in *Cheeves* and *Gibson*. However, the pertinent portion of *McLendon* concerns a grant of summary judgment against a plaintiff who knowingly sold kaolin land to a kaolin company. Similarly, here and in *Butts*, the courts granted summary judgment against plaintiffs who knowingly sold kaolin land to a kaolin company. There is no inconsistency. *See Butts*, 450 S.E.2d at 246.

Owens suggested that Mr. Nix be sanctioned under Rule 11 for filing a fifth recusal motion; and (3) Judge Owens testified in the judicial misconduct proceedings that he found his dealings with Mr. Nix to be a chore because Mr. Nix asked too many questions and engaged in repetitive behavior. None of these allegations support the bias charge.

First, the mere fact that a lawyer accuses a court of wrongdoing does not mean the court has to recuse itself. 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, § 3542, pp. 577-78 (2d ed. 1984); *see In re Winslow*, 107 B.R. 752, 753 (D. Colo. 1989) ("The filing of a complaint with the Judicial Council is not grounds for disqualification."). Second, Judge Owens' perception of a potential Rule 11 violation in petitioners' *fifth* recusal motion is not antagonism. The crowning evidence on this point is that Judge Owens' suggestion of a Rule 11 violation was found to be meritorious by an independent judge. *See* 5a-15a.

Finally, Judge Owens' assertion that Mr. Nix asks more questions than are necessary and "talks forever" does not show antagonism. At worst, these comments reflect Judge Owens' expression of dissatisfaction with Mr. Nix' behavior and filing of repetitive, prolix motions. Neither such comments nor Judge Owens' ruling denying plaintiffs' motions for recusal are subject to an interpretation of "deep-seated antagonism" under this Court's opinion in *Liteky v. United States*, 114 S. Ct. 1147, 1157 (1994):

> *Not* establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display . . . even a stern and short-tempered judge's ordinary efforts at courtroom administration—remain immune.

(Emphasis in original.) Petitioners' underlying allegations of bias thus have no basis, and petitioners' entire recusal argument fails as a result.

Not only are the allegations of bias meritless, but petitioners' contentions regarding the standard applied are meritless as well. Petitioners claim that the district court should have used the "appearance of impartiality" standard under 28 U.S.C. § 455(a), instead of examining whether a virulent bias against counsel existed that could be imputed to the party and thereby trigger recusal under 28 U.S.C. § 144 and 28 U.S.C. § 455(b)(1). Petitioners claim that an appearance of partiality can arise sufficient for recusal, even if the partiality is against counsel, and assert that the district court overlooked this possibility.

In addition to the fact that petitioners never raised the issue in the courts below, petitioners are wrong in asserting that the district court failed to apply the "appearance of impartiality" standard. The district court's opinion on the fifth motion for recusal shows that the district court rejected petitioners' motion for recusal under both the "appearance of impartiality" standard and the virulent bias standard. *See* Pet. App. 5-6. ("The test for recusal under both § 455(a) and Canon 3(e)(1) is 'whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality.' ") (citation omitted) ("In rare circumstances . . . the bias against an attorney is so virulent that the judge's impartiality toward that attorney's client may reasonably be questioned. Such is not the case here."). Thus, even if the appearance of impartiality standard can be used for bias against counsel (as petitioners contend and respondents do not concede), the district court applied it. Moreover, at no time did bias or the appearance of bias exist which the district court felt it must discount or ignore because the bias was against counsel and not a party.

Finally, petitioners are also wrong in contending that the courts of appeals are divided over the standard for recusal based on bias or prejudice toward a party's counsel. *See* Petition at 16 ("stark differences" among the courts of appeals exist); 19 ("there remains a wide disparity of standards and burdens of proof among the various [courts of appeals] as to counsel-based disqualifications"). An analysis of the caselaw reveals that the circuit split petitioners allege amounts to nothing more than subtle differences in emphasis with respect to a single basic standard.

28 U.S.C. § 144 provides for recusal "[w]henever a *party* to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party . . . ." (Emphasis added.) Similarly, 28 U.S.C. § 455 (b)(1) provides for recusal if a judicial officer "has a personal bias or prejudice concerning a *party*, or personal knowledge of disputed evidentiary facts concerning the proceeding." (Emphasis added.)

Relying squarely on this statutory language, the courts of appeals have focused on whether bias toward a *party* exists warranting disqualification. *See, e.g., Diversified Numismatics, Inc. v. City of Orlando*, 949 F.2d 382, 385 (11th Cir. 1991). The circuits uniformly recognize an "exception" to this principle for bias toward counsel strong enough to raise a doubt as to the judge's impartiality toward counsel's client. Although the circuits vary in the language they use to describe this exception, the distinctions that exist are semantic rather than substantive.

The leading decision concerning the issue of recusal based on bias toward counsel in *Davis v. Board of School Comm'rs*, 517 F.2d 1044 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). *Davis* held that

> an appellate court, in passing on questions of disqualification [based on bias or prejudice against counsel], should determine the disqualification on the basis of conduct which shows bias or prejudice or lack of impartiality by focusing on a party rather than counsel.

Id. at 1052. This approach is appropriate with respect to analysis under both § 144 and § 455. *Id. Davis* recognizes, however, that the court's controversy with counsel could be an indication of bias toward a party that would require recusal under the statutory standards. For example, "there could be a case where the cause of the controversy with the lawyer would demonstrate bias of such a nature as to amount to a bias against a group of which the party was a member . . ." *Id.* at 1051.

The other courts of appeals that have considered the issue of counsel-based disqualification since *Davis* have followed the same basic approach as *Davis*. For example, the Eighth Circuit noted (in a passage quoted at pages 20-21 of the Petition) that "the cases generally support a theory of imputed bias [*i.e.*, from counsel to the party] only where there are alleged additional facts that suggest that bias against the attorney actually extends to the party." *Souder v. Owens-Corning Fiberglas Corp.*, 939 F.2d 647, 653 n.6 (8th Cir. 1991) (citing *Davis* and decisions of the Fourth and Tenth Circuits).

This approach of focusing on the party in assessing the existence of disqualifying bias while recognizing the possibility that bias toward counsel may in some circumstances be imputed to the party has gained universal acceptance among the courts of appeals. *See In re Cooper*, 821 F.2d 833, 839 (1st Cir. 1987) ("occasionally exceptional circumstances do arise where a judge's attitude toward a particular attorney is so hostile that the judge's impartiality toward the client may reasonably be questioned"); *In re IBM Corp.*, 618 F.2d 923, 932 (2d Cir. 1980); *In re Beard*, 811 F.2d 818, 830 (4th Cir. 1987)

("[b]ias against an attorney is not enough to require disqualification under § 455 unless petitioners can show that such a controversy would demonstrate a bias against the party itself"); *Travelers Ins. Co. v. Liljeberg Enters., Inc.*, 38 F.3d 1404, 1412 (5th Cir. 1994); *Davis; Souder*, 939 F.2d at 653 (8th Cir.) ("while mere bias against counsel is not grounds for recusal, under specific circumstances bias against an attorney can reasonably be imputed to a party"); *United States v. Burt*, 765 F.2d 1364, 1368 (9th Cir. 1985) ("while other courts have suggested that 'bias for or against an attorney can certainly result in bias toward the party,' [citing, *inter alia, Davis*], Judge Real's bias was not so virulent here as to result in material harm to Burt's defense"); *United States v. Ritter*, 540 F.2d 459, 462 (10th Cir.) ("bias in favor of or against an attorney can certainly result in bias toward the party"), *cert. denied sub nom. Olson Farms, Inc. v. United States*, 429 U.S. 951 (1976); *Diversified Numismatics*, 949 F.2d at 385 (11th Cir.) ("it is conceivable that a judge could harbor such ill-will toward an attorney that the attorney's clients would also be prejudiced").

Requiring disqualification based on bias against counsel where that bias does not affect the judge's impartiality toward a party would be an unworkable approach. As the court stated in *Davis*,

> Read broadly, this peremptory challenge type approach would bid fair to decimate the bench. Lawyers, once in a controversy with a judge, would have a license under which the judge would serve at their will.

517 F.2d at 1050.

Although petitioners allege "stark differences" among the circuits regarding the issue of counsel-based disqualification, petitioners' allegations do not withstand a review of the relevant case law. The courts of appeals have generally agreed with the *Davis* approach during

the twenty years since *Davis* was rendered. It is therefore not necessary for this Court to step in as the final arbiter of federal law to settle any division among the circuits.

CONCLUSION

For the foregoing reasons, respondents respectfully submit that the petition for a writ of certiorari should be denied.

FRANK C. JONES
Counsel of Record
RALPH A. PITTS
RICHARD A. SCHNEIDER
JAMES W. BOSWELL
KING & SPALDING
191 Peachtree Street, N.E.
Atlanta, Georgia 30303
(404) 572-4600
Counsel for Respondents

Dated: April 17, 1995

APPENDIX

APPENDIX

[Filed Jun. 25, 1990]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-8561

IN RE: THEODORE GIBSON, *et al.*,
Petitioners.

Appeal from the United States District Court
for the Middle District of Georgia

Before FAY, KRAVITCH and CLARK, Circuit Judges.

BY THE COURT:

The petition for writs of mandamus and prohibition is DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-8317

D.C. Docket No. CR-89-46-MAC(WDO)

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
ROBERT LEE WATKINS,
Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Georgia

(December 7, 1990)

Before KRAVITCH and ANDERSON, Circuit Judges, and LYNNE*, Senior District Judge.

PER CURIAM:

Robert Lee Watkins appeals his conviction of aiding and abetting a witness to testify falsely in violation of 18 U.S.C. §§ 1623 and 2. Appellant claims on appeal that the testimony at issue, although admittedly perjured, was not material. This claim is frivolous.

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* Honorable Seybourn H. Lynne, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

Appellant also argues that the district judge erred in declining to recuse himself and in declining to refer the recusal decision to another judge pursuant to 28 U.S.C. § 144. After a careful review of the record, we conclude that the district judge did not abuse his discretion.

The letter dated July 11, 1989 conveyed certain information relating to the previous judge's decision to recuse himself. The district judge in this case received that information in his judicial capacity, *i.e.*, as the chief judge of the district with responsibility for reassigning the case. Thus, the district judge acquired that knowledge in his judicial capacity and not in an extra-judicial capacity. Moreover, there is nothing in the letter which indicates bias on the part of the district judge; the letter indicates bias only on the part of the previous judge on account of which he recused himself.

Appellant also asserts that the district judge in this case was biased as a result of conferring with the previous judge. Taking all reasonable inferences favorable to appellant, the context of the alleged conference is as follows: The previous judge, while presiding in a civil case, conferred with his chief judge concerning the appropriate procedure when he suspected that appellant had aided and abetted perjury. The procedure which was in fact followed (and therefore may have been discussed with the chief judge in the alleged conference) was to refer the matter to the appropriate authorities for possible prosecution and to stay the civil case. Thus, any information conveyed at the alleged conference was received by the district judge, *i.e.*, the chief judge, in his judicial capacity and not in an extra-judicial capacity. Moreover, nothing in the information which could reasonably have been received by the district judge would indicate disqualifying bias on the part of the judge.

The other assertions of bias on the part of the district judge are wholly without merit and warrant no discussion.

AFFIRMED.

[Filed Jun. 26, 1992]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-8554

IN RE: ROBERT WATKINS, THEODORE GIBSON,
CURTIS CHEEVES, *et al.*,
Petitioners.

On Petition for Writ of Mandamus/Prohibition

Before: FAY, BIRCH and DUBINA, Circuit Judges.

The petition for writ of mandamus/prohibition filed in this matter is DENIED.

[Filed Oct. 30, 1992]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

Case Nos. 86-43-1-MAC(WDO)

and

86-44-2-MAC(WDO)

CURTIS CHEEVES, *et al.*,
Plaintiffs,

-vs-

SOUTHERN CLAYS, INC., *et al.*,
Defendants.

OPINION AND ORDER

Attorney Franklin R. Nix is counsel of record for the Plaintiffs. During a period of two and a half years he has filed in these cases and in a related criminal case [1] no less than seven separate and successive motions seeking to have Chief Judge Wilbur D. Owens, Jr., disqualified as the presiding judge. All of those motions have been denied.

On another occasion, at a time when no such motion for disqualification was pending, Mr. Nix caused deposition notices and subpoenas *duces tecum* to be served on Chief Judge Owens, as well as the other judges of this district, seeking to orally depose them "with respect to factual matters relevant to Chief Judge Owens' disqualifi-

[1] *United States v. Watkins*, Case No. 89-46 MAC(WDO) Criminal.

cation." I was designated at that time pursuant to 28 U.S.C. § 292(b) by the Chief Judge of the Circuit for the purpose of deciding motions to quash those subpoenas; and, by opinion entered June 17, 1992, I ordered that the subpoenas should be quashed and that depositions of the judges could not be taken. *Cheeves v. Southern Clays, Inc.*, —— F.Supp. —— (M.D. Ga. 1992) (1992 WL 165479). That opinion recited the factual circumstances surrounding each of the various motions for recusal, and there is no need, therefore, to repeat that discussion here.

While those proceedings involving the depositions of the judges were pending before me, Mr. Nix filed his seventh and most recent motion for recusal of Chief Judge Owens.[2] By order entered June 5, 1992, Chief Judge Owens denied that motion and, in the concluding paragraph of the order, stated:

> The court finds that this fifth motion to recuse has risen to the level of harassment. Nix has thirty days to show cause in writing why the court should not impose Rule 11 sanctions.

I was then designated for a second time by the Chief Judge of the Circuit pursuant to 28 U.S.C. § 292(b) to "handle a hearing in which Franklin R. Nix has been ordered by Chief Judge Wilbur D. Owens, Jr., to show cause why he should not be sanctioned pursuant to Rule 11 of the Federal Rules of Civil Procedure in [these cases]." Mr. Nix filed a timely written response to the

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[2] The motion, filed April 9, 1992, was in fact the fifth such motion made in these civil cases. The other two motions, bringing the total to seven, were filed in the related criminal proceeding (see note 1, *supra*.) The motion of April 9, 1992 purported to be addressed to me but I declined to consider it on its merits because I was only designated to decide the deposition issue, not the underlying issue of disqualification. *See Cheeves v. Southern Clays, Inc., supra.*

order to show cause and I then scheduled and conducted a hearing in the matter on September 16, 1992.

Three issues are presented. The first, raised during oral argument at the hearing, is whether the court has subject matter jurisdiction under Rule 11 to impose any sanctions in the circumstances of this case. The second issue, assuming jurisdiction exists, is whether Rule 11 has been violated; and the third issue involves the appropriate sanction to be imposed in the event a violation of the rule is found. I have determined that subject matter jurisdiction does exist, i.e., that Rule 11 does apply; that the rule has been violated; and that an appropriate sanction in the form of a fine should be imposed.

I

Mr. Nix points out that the opposing parties have not sought Rule 11 sanctions in the form of attorney's fees or the like; that Chief Judge Owens invoked the rule of his own volition; and that the alleged violation is limited to harassment[3] which, presumably, refers to harassment of the court itself rather than opposing counsel or the opposing litigants since they have made no such claim. From this it is argued that any alleged harassment of the court would necessarily constitute a criminal contempt which can only be dealt with pursuant to Rule 42(b), F.R. Cr. P., or perhaps 18 U.S.C. § 401, and that Rule 11 simply does not apply. Hence, on the present record, Nix argues, the Court is without subject matter jurisdiction to impose any sanction against him.

While it is true that there does not appear to be any reported case just like this one in which a court has in-

[3] Rule 11, F. R. Civ. P., states in pertinent part:

> The signature of an attorney . . . constitutes a certificate by the signer that the . . . motion, or other paper . . . is not interposed for any improper purpose such as to *harass* or to cause unnecessary delay or needless increase in the cost of litigation. (Emphasis supplied).

voked Rule 11 *sua sponte* to punish counsel for acts of harassment, and while it may also be true that the same behavior would constitute a criminal contempt subject to prosecution under Criminal Rule 42(b) or 18 U.S.C. § 401, it does not necessarily follow that Rule 11 is thereby rendered inapplicable. There is ample authority for the proposition that Rule 11 can be invoked by the district court on its own motion; the rule, in fact, explicitly provides that the court may act "upon its own initiative." There is also binding precedent in this Circut concerning Rule 11 violations that a monetary sanction as a financial penalty, not measured by costs or attorneys' fees of opposing parties, is not only an available option under the rule, it is often the preferred sanction. In *Donaldson v. Clark*, 819 F.2d 1551, 1557 (11th Cir. 1987) *en banc*, the Court held:

> Imposing a financial penalty often will be the most effective and fair means of enforcing Rule 11 and deterring baseless suits. When imposed upon a lawyer, a financial penalty forces the lawyer rather than the client to bear the costs of violations of the rule. . . . We hold that monetary sanctions serve the purposes of Rule 11 and may be imposed as sanctions for Rule 11 violations in appropriate cases so long as they are imposed with due process.

The Court also held in *Donaldson* that the contempt rule, Rule 42(b), F.R. Cr. P., need not be followed every time a court considers imposing a monetary sanction, and that a violation of Rule 11 is "fundamentally different from an infraction of criminal contempt and therefore warrants different sanction proceedings." *Id.* at 1558. *See also Kleiner v. First National Bank of Atlanta*, 751 F.2d 1193, 1209-1210 (11th Cir. 1985) (imposition of fine in disciplinary proceedings distinguished from criminal contempt).

I therefore conclude that Rule 11 can properly be invoked in the circumstances presented by this case, and

the fact that the same circumstances might also be made the basis of contempt or disciplinary proceedings does not alter that result.

II

Concerning the central issue of whether counsel's behavior has amounted to harassment in violation of Rule 11, Mr. Nix first argues that the last motion in these civil cases was not even addressed to Chief Judge Owens for decision but was, instead, addressed to me. This alone demonstrates, he says, that harassment of Chief Judge Owens was not intended and could not have been accomplished. This approach, of course, totally ignores the historical background consisting of all the preceding motions and seeks inappropriately to confine attention to the last motion alone for purposes of the Rule 11 analysis. Clearly, however, in determining whether harassment has occurred it is necessary to examine the totality of the relevant conduct and the pattern of behavior presented. The word "harassment," almost by definition, will rarely apply to a single act; it usually contemplates a series of acts or taunts. In deciding this issue, therefore, the court will take into account the cumulative effect of, and the circumstances surrounding, all of Mr. Nix's motions to disqualify Chief Judge Owens including those filed in the related criminal proceeding.[4]

With regard to the frequency and repetitive nature of the motions, Mr. Nix argues that each one differed in some important respect from its predecessors so that each motion was, in the language of Rule 11, "well grounded in fact and . . . warranted by existing law." He points out, for example, that the second motion in the civil cases (the third overall motion) was predicated upon

[4] Of course, Rule 11 has no effect in the criminal case and cannot be applied with respect to any motions filed in that case. It is appropriate, however, to consider the filing of those motions as a part of the overall pattern of conduct from which the Rule 11 issue arises.

"new evidence,"[5] and that the next motion in the civil cases (the fifth overall motion) was based upon both 28 U.S.C. § 144 and § 455(a), accompanied by affidavits, whereas the earlier motions were submitted on the sole authority of § 455(a) without supporting affidavits.

All of the motions, however, and the orders denying them, shared two common features which Mr. Nix simply chose to ignore. First, all of the motions asserted and reasserted the same ultimate basis, namely, that Chief Judge Owens had apparently engaged in so-called *ex parte* discussions or communications with his colleague, Judge Fitzpatrick, concerning an act of subornation of perjury by Robert L. Watkins, the plaintiffs' agent, so that Chief Judge Owens' impartiality toward Watkins and the plaintiffs might reasonably be questioned.[6] Secondly, the orders denying the motions—including the unpublished opinion of the Court of Appeals in the criminal case—consistently and repeatedly rejected disqualification of Chief Judge Owens on the ground that, at best, the motions demonstrated only a judicial rather than a personal bias, and only a personal bias warrants disqualification of a judicial officer under the statutes.

There are two separate statutes governing judicial disqualification. The older statute is 28 U.S.C. § 144 which provides:

> Whenever a party to any proceeding in a district makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in

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[5] This "new evidence" is discussed in *Cheeves v. Southern Clays, Inc., supra,* —— F.Supp. at ——.

[6] The subornation of perjury by Watkins was the subject of the separate criminal proceeding referred to in note 1, *supra.*

> favor of any adverse party, such judge shall proceed no further . . .

The newer statute, enacted in 1974, is 28 U.S.C. § 455 (a) and (b) which provides:

> (a) Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> > (1) Where he has a personal bias or prejudice concerning a party . . .

The interrelationship of Sections 144 and 455 was first considered in this Circuit[7] in *Davis v. Board of School Commissioners of Mobile County*, 517 F.2d 1044, 1052 (5th Cir. 1975), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976). The Court held:

> Construing §§ 144 and 455 *in pari materia* we believe that the test is the same under both. We thus hold that an appellate court, in passing on questions of disqualification of the type here presented, should determine the disqualification on the basis of conduct which shows bias or prejudice or lack of impartiality by focusing on a party rather than a counsel. *The determination should also be made on the basis of conduct extra-judicial in nature as distinguished from conduct within a judicial context.* This means that we give §§ 144 and 455 the same meaning legally for these purposes, whether for purposes of bias and prejudice or when the impartiality of the judge might reasonably be questioned. (Emphasis supplied).

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[7] The law of the Fifth Circuit as it existed prior to October 1, 1981, is the law of the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) *en banc*.

See also, Parrish v. Board of Commissioners of the Alabama State Bar, 524 F.2d 98 (5th Cir. 1975), *cert. denied,* 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976); *Phillips v. Joint Legislative Committee,* 637 F.2d 1014 (5th Cir. 1981), *cert. denied,* 456 U.S. 960, 102 S.Ct. 2035, 72 L.Ed.2d 483 (1982); *United States v. Phillips,* 664 F.2d 971 (5th Cir. 1981), *cert. denied,* 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982); *United States v. Meester,* 762 F.2d 867 (11th Cir. 1985), *cert. denied,* 474 U.S. 1024, 106 S.Ct. 579, 88 L.Ed.2d 562 (1985); *Jaffree v. Wallace,* 837 F.2d 1461 (11th Cir. 1988).

Mr. Nix argues that Section 455(a), requiring disqualification whenever a judge's "impartiality might reasonably be questioned," creates a broader basis for recusal than Sections 144 or 455(b)(1) which are restricted to cases of "personal bias," and that under Section 455(a) a disqualification may be required in some cases even when the alleged bias stems from a judicial as distinguished from a personal source. Ordinarily, however, as all of the governing Eleventh Circuit decisions make clear, claims of bias or prejudice under either statute must relate to personal rather than judicial bias; and this remains true under subsection (a) as well as subsection (b) of Section 455. When it is asserted that a judge's "impartialty might reasonably be questioned," it must be shown that the cause stems from extra-judiciai conduct; it is only the exceptional case in which bias from a judicial source may require disqualification:

> An exception to the general rule that the bias must stem from an extra-judicial source exists where 'such pervasive bias and prejudice is shown by otherwise judicial conduct as would constitute bias against a party.' (Citation omitted). *United States v. Meester,* 762 F.2d 867, 885 (11th Cir. 1985).

In this case none of the motions for disqualification ever claimed a "pervasive" bias and prejudice shown by

judicial conduct. Rather, as previously stated, the claim was that Chief Judge Owens' impartiality might reasonably be questioned because of so-called *ex parte* discussions, and one communication by letter, between Chief Judge Owens and Judge Fitzpatrick in a judicial context; and that claim was repeatedly and correctly rejected as legally insufficient.

Moreover, it is important to note that the repetitive motions for disqualification were not just rejected by Chief Judge Owens alone. The latter two motions in these civil cases—one filed September 26, 1991 and one filed April 9, 1992—were both submitted *after* the Court of Appeals had *twice* reviewed the denials of earlier motions, once by rejection of a petition for mandamus and prohibition, *In re Theodore Gibson*, No. 90-8561 (11th Cir., June 25, 1990), *reh'g and suggestion of reh'g en banc denied* (Sept. 18, 1990), and once again on the direct appeal in the criminal case, *United States v. Watkins*, 921 F.2d 285 (11th Cir. 1990), *reh'g denied*, 931 F.2d 901 (11th Cir. 1991), *cert. denied* —— U. S. ——, 112 S.Ct. 333 (1991). *See also, Cheeves v. Southern Clays, Inc., supra*, —— F.Supp. at ——, n. 10.

In determining the propriety of counsel's conduct under Rule 11, a preliminary question arises as to whether the rule requires a finding of an actual subjective intent to harass, or whether an objective test should be applied, i.e., determining what a reasonable person would have done, or refrained from doing, under the same circumstances. The answer is clear. Under the rule as amended in 1983, the objective standard applies. *Donaldson v. Clark*, 819 F.2d 1551, 1556 (11th Cir. 1987) *en banc*.

After reviewing the totality of the circumstances, particularly the filing of seven successive repetitive motions; an apparent failure on the part of counsel to either acknowledge or accept the legal principle consistently applied by the Court in denying those motions, two of

such rulings being made by the Court of Appeals itself; and after applying an objective standard to those circumstances (rather than a subjective or bad faith standard), I have concluded that Rule 11 was violated in this case. No reasonable person—no reasonable lawyer—would have filed the last two motions after the Court of Appeals decisions. Or, stated another way, in the language of Rule 11, from any objective point of view those motions could only have been "interposed for [an] improper purpose, such as to harass."

III

Having decided that Rule 11 applies, and that the rule has been violated, it remains for the court to determine an appropriate sanction. Since no other party has sought an award of fees or costs (and there is no evidence before me to establish the measure or amount of any such award), the imposition of a fine is the appropriate sanction. *Donaldson v. Clark, supra.* In deciding upon the amount of the fine the court has first attempted to survey the Rule 11 sanctions previously imposed in this district and has discovered, interestingly, that *Donaldson v. Clark* happened to arise here and is the only reported decision involving a Rule 11 sanction in the Middle District of Georgia. In that case a fine of $500 was imposed in addition to fees and costs. In general, it has been held that fines should be established in the least amount necessary to deter future misconduct, and the offender's ability to pay is ordinarily one of the factors to be taken into account in making that judgment. See *White v. General Motors Corporation, Inc.*, 908 F.2d 675, 684-685 (10th Cir. 1990) and authorities there cited. In this instance, although notice was given and a hearing was conducted, no evidence was sought or presented concerning Mr. Nix's individual financial status.

I have determined, therefore, that the publication of this opinion together with the assessment of a symbolic

fine in the amount of $500.00 and a reference of the matter to the State Bar of Georgia [8] should be sufficient to meet all of the objectives of Rule 11.

Accordingly, attorney Franklin R. Nix is ordered to pay a fine in the amount of $500.00 to the Clerk of this Court. Such fine shall be paid within twenty (20) days, failing which the Clerk shall enter judgment against him in that amount in favor of the United States. The Clerk is further directed to promptly bring this opinion and order to the attention of the State Bar of Georgia for its consideration as to whether additional disciplinary proceedings may be warranted.

IT IS SO ORDERED.

DONE and ORDERED at Jacksonville, Florida, this 27th day of October, 1992.

/s/ William Terrell Hodges
United States District Judge

[Entered on Docket October 30, 1992]

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[8] The Middle District of Georgia does not presently have a rule of court governing the discipline of members of its bar.

Supreme Court, U.S.
FILED
MAY 10 1995
CLERK

No. 94-1540

In The

Supreme Court of the United States

October Term, 1994

CURTIS CHEEVES & THEDORE GIBSON, et al.,

Petitioners,

v.

SOUTHERN CLAYS, INC., et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION

FRANKLIN R. NIX
1020 Foxcroft Road, N.W.
Atlanta, Georgia 30327-2624
(404) 237-0387

Counsel for Petitioners

May 9, 1995

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

I. STATEMENT OF THE CASE 1

A. Introduction 1

B. Overview of Disqualifications of Law 2

1. § 144 vs. § 455 2

2. *Liljeberg v. Liteky* – a Court Divided ... 3

3. Counsel-Based Circuit Constraints on § 455(a) 3

4. Respondents' Avoidance of Question Presented 4

5. Breadth of § 455(a) – Congressional Intent 4

C. Respondents' Statement of the Case 6

1. Disqualification Facts Avoided 6

2. Unconscionability Facts Avoided 7

3. Respondents' Avoidance of Objective Circumstances 8

II. RESPONDENTS' REASON FOR DENYING WRIT 8

A. The Recusal Orders Were Properly Appealed 8

B. Issue Presented to Eleventh Circuit 9

C. Inapplicability of *Butts v. Southern Clays* .. 9

D. Respondents Beg the Question Presented.... 10

III. CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986) 5

Berger v. United States, 255 U.S. 22 (1921) 2

Butts v. Southern Clays, Inc., 450 S.E.2d 244, (Ga. App. 1994), *cert. denied*, (No. S95C0357) (Ga. Feb. 20, 1995) 9

Ennis v. Freeport Kaolin Co., No. 85-17-2MAC (M.D. Ga. 1987), *aff'd*, 838 F.2d 1220 (11th Cir. 1988) 10

In re Continental Airlines Corp., 901 F.2d 1259 (5th Cir. 1990) 7

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988) 3, 5, 6, 8

Liteky v. United States, 1994 U.S. LEXIS 2045, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994) 3, 4, 8, 9

Parker v. Connors Steel Co., 855 F.2d 1510 (11th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989) 8

STATUTES

28 U.S.C. § 144 ..... *passim*

28 U.S.C. § 372(c) 6, 8

28 U.S.C. § 455(a) ..... *passim*

28 U.S.C. § 455(b)(1) 4

28 U.S.C. § 455(b)(2)-(5) 2

28 U.S.C. § 2106 7

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

F.R.Civ. P. 60(b)(6) 3

Eleventh Circuit Rule 33-1(b)(1)(i) & (ii)..... 9

Supreme Court Rule 15 .....3, 6

No. 94-1540

In The

Supreme Court of the United States

October Term, 1994

CURTIS CHEEVES & THEDORE GIBSON, et al.,

Petitioners,

v.

SOUTHERN CLAYS INC., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION

I. STATEMENT OF THE CASE

A. Introduction

This Reply to the Brief in Opposition ("Opp. Br.") addresses in detail the three most important considerations favoring review by certiorari:

(1) The confused and divided state of disqualification law in general and vis-a-vis counsel in particular;

(2) The controlling facts and law not challenged by Respondents notwithstanding S.C. Rule 15's strong admonitions, which

facts and law dictate reversal of the summary judgments below *wholly apart* from the district court's disqualification to enter same; and

(3) The disingenuous and fallacious premises underlying every one of Respondents' reasons for denying the writ.

B. Overview of Disqualification Law

1. § 144 vs. § 455

Confusion reigns. 28 U.S.C. § 144 procedurally provides the objectivity of another judge at least in theory,[1] but no objective standard for decision. § 455 provides both general and specific objective standards but no procedure.

§ 144 turns upon personally verified *reality* whereas § 455, apart from the bright-line "interest" mandates of subsections (b)(2)-(5), turns exclusively upon objective *appearances* creating the likelihood that a judge's "impartiality *might* reasonably be questioned" by the lay public's perception of questionable appearances.

---

[1] After denial of Petitioners' first recusal motion and motion for reconsideration, both filed under § 455 **only**, Petitioners' third recusal motion based on new district court disclosures proceeded under § 455 **and § 144.** Two affidavits of Petitioners' principals, four affidavits of trial counsel collectively representing 119 years of trial experience, and counsel's certificate of good faith were dismissed as facially insufficient to require reference to another judge. Petitioners' one-time § 144 attempt to obtain the objectivity of a different judge, just as in *Berger*, counted for naught. *Berger v. United States*, 255 U.S. 22, 27 (1921).

2. *Liljeberg* and *Liteky* – a Court Divided

The Court's *Liljeberg* and *Liteky* decisions[2] both reflect 5 to 4 division rather than unanimity. The Court is divided over disqualification *means* rather than disqualification *objectives*. The *Liljeberg* minority feared the illogical expansion of Rule 60(b)(6) vacatur[3] while the *Liteky* minority feared that a strict "extrajudicial" source requirement, even with a "fair judgment impossible" proviso, undermines the very breadth of § 455(a) protection intended by Congress and upheld in *Liljeberg*.[4]

3. Counsel-Based Circuit Constraints on § 455(a)

The question presented involving extrajudicial, counsel-based disqualification is precisely analogous to the *Liteky* minority's concern that the " 'impossibility of fair judgment' test bears little resemblance to the objective

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[2] *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988) and *Liteky v. United States*, 1994 U.S. LEXIS 2045, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994).

[3] Petitioners quite agree that *Liljeberg* is "long on ethics in the abstract, but short on workable rules of law" (*Liljeberg* dissent at 870) **unless,** as in the case at bar, the district court deliberately conceals disqualifying circumstances well known to it.

[4] Respondents argue that the question presented was not argued to the Eleventh Circuit (Opp. Br. 10-11). Petitioners, however, argued below that seven pages of disqualifying circumstances (Pet. 8-14), which remain completely unchallenged despite S.C. Rule 15's strong admonitions, dictated disqualification not only under § 455(a) (Reply App. 9-14) but also the "fair judgment impossible" proviso of *Liteky*. (Reply App. 15).

standard Congress adopted in § 455(a): whether a judge's 'impartiality might reasonably be questioned.' " *Liteky*, 114 S.Ct. 1161. In like fashion, circuit requirements insisting that counsel-focused judicial bias must be imputable to the *parties* or must be so "pervasive," "virulent," "exceptional" or "continuing" as to raise a presumption of potential harm to *parties* bear scant resemblance to the objective test of § 455(a).[5]

4. Respondents' Avoidance of Question Presented

Respondents beg the question presented in arguing that circuit caselaw reflects only "subtle differences in emphasis with the same basic standard" and in their next breath citing exclusively § 144 and § 455(b)(1) to the complete exclusion of § 455(a). (Opp. Br. 16). In doing so, Respondents only replicate the attempts of many circuits to "drive a square peg into a round hole" by equating counsel-based bias to party bias rather than resorting ***directly*** to § 455(a).

5. Breadth of § 455(a) – Congressional Intent

Congress did not exclude counsel from the ambit of § 455(a). Nor did Congress provide that circumstances must reflect "pervasive," "virulent," "exceptional," or

---

[5] While finding no support in the language of § 455(a), such terms might readily satisfy the "fair judgment impossible" proviso of *Liteky*, a catchall provision which, though more restrictive than § 455(a), makes no distinction between parties and counsel. *See Liteky*, 114 S.Ct. 1157.

"continuing" appearances of animus toward counsel *before* the lay public's suspicions about the court's impartiality may be deemed *"reasonable."* Certainly Congress was equally mindful of this Court's perception "that people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges." *Liljeberg*, 486 U.S. 864-65. Stated more directly, could not the lay public fully informed of the undisputed course of events between the district court and Petitioners' counsel reasonably question whether the district court *might* just have lost the ability "to hold the balance nice, clear and true."[6]

In 1974, Congress imposed upon every district court the responsibility, without reference to another judge, of posing and answering itself the question of whether its "impartiality might reasonably be questioned" in any case. The ideal was self-enforcement of the standard. In the case at bar, however, the Court may search the record high and low but it will find not a single instance of the district court (Pet. App. 4-6), or Judge Hodges in considering Rule 11 sanctions (Opp. Br. App. 5a-15a), nor the Eleventh Circuit on mandamus or direct appeal, ever having even posed, much less answered, the inquiry demanded by Congress – whether the district court's "impartiality *might* reasonably be questioned" by fully informed lay citizens.[7]

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[6] *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 825 (1986).

[7] Given the Respondents' insistence upon ignoring the fact that Petitioners' appeal is strictly limited to the district court's denial of the fourth and fifth disqualification motions, whose grounds were exclusively counsel-based, three points ignored

C. Respondents' Statement of the Case

Respondents have avoided the Court's Rule 15 admonition to "address any perceived misstatements of fact or law set forth in the petition . . . ".

1. Disqualification Facts Avoided

Respondents nowhere refute or object to a single word of Petitioners' seven-page enumeration of the objective circumstances warranting the lay public's reasonable doubts about the district court's impartiality. (Pet. 8-14). Exercising the objectivity which the district court, Judge Hodges and the Eleventh Circuit lacked, requires only answering the question of how many lay observers exposed to these undisputed circumstances would not seriously question the district court's impartiality. Unlike *Liljeberg*, the Court need not engage in speculation about what the district court knew and when did he know it.

---

by Respondents should be made. (1) In contrast to the district court's dismissal of the first three recusal motions, the same evidence appended to Petitioners' § 372(c) complaint prompted the Eleventh Circuit's Chief Judge to impanel a special committee. (2) The special committee's investigative counsel found that the limited **actual facts** to which Petitioners' counsel had access " . . . *understandably* raised misconduct concerns . . . ". (Pet. 9) (emphasis in original). (3) The Petitioners' first three recusal motions related to their former agent, Robert L. Watkins, became moot when Petitioners unanimously terminated Watkins' services and his relationship to Petitioners' cases after Watkins' appeals and § 2255 motion had run their course.

2. Unconscionability Facts Avoided

Equally important to the grant of certiorari is the Respondents' complete avoidance of undisputed facts controlled by universal unconscionability authority. (Pet. 5, fn. 5). The enormity of Respondents' admitted conduct – i.e., purchasing 15 million tons of underground mineral reserves worth $4,900,000 for only $75,000, and selling the Gibson farm for $1,440,000 only one year after Respondents' $40,000 purchase (Pet. 5-6) – equals the purchase of a house worth $100,000 for only $1,500. These undisputed facts alone dispel the fiction that a circuit court's *de novo* review of summary judgments catches all errors committed below.

So damning are these undisputed facts and unconscionability law that Respondents (and the Eleventh Circuit) avoided them as completely below as they now do before this Court. Petitioners' unconscionability facts and arguments (Reply App. 7-9 and 21-22) were as unchallenged below (Reply App. 22, fn. 1) as they are now. Respondents must continue their avoidance of Petitioners' unconscionability counts at all costs because the district court's indisputable error as a matter of law in dismissing such counts as "constructive fraud" (Order of December 17, 1986 entering partial summary judgment for Respondents) is the Achilles' heel of the summary judgments affirmed below.

These undisputed facts and law guarantee that the Court's grant of certiorari, reversal and remand under either § 455(a) or § 2106 could not succumb to reaffirmance of the summary judgments under the harmless error rule applied in *In re Continental Airlines Corp.*, 901

F.2d 1259, 1263 (5th Cir. 1990) and *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1527 (11th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989). Therefore, unlike *Liteky* and *Liljeberg*, the court may confidently grant certiorari with the assurance that reversal of the district court's summary judgment and the Eleventh Circuit's affirmance is dictated as a matter of law by the district court's "constructive fraud" error.

3. Respondents' Avoidance of Objective Circumstances

Respondents' extensive focus upon procedural history is designed to divert the Court's attention from Respondents' inability to dispute objective appearances (Pet. 8-14) disregarded by both the district court and Judge Hodges. Indeed, Judge Hodges' Rule 11 decision relied precisely upon the circuit constraints upon § 455(a) challenged by the question presented (Opp. Br. 11a-12a). Totally ignored for example, are the § 372(c) proceedings, the district court's sworn testimony (Pet. 10-11) and the disparate treatment of Mr. Nix and Professor Patterson. (Pet. 11-14).

II. RESPONDENTS' REASONS FOR DENYING WRIT

A. The Recusal Orders Were Properly Appealed

Respondents' citation of inapplicable authorities relies upon the false premise that Petitioners' notice of appeal identified "specific issues" or "specific determinations" within the orders appealed. In fact, Petitioners' notice of appeal (Reply App. 1-3) identified only the

dates of the three **final** orders appealable as a matter of right. Respondents' "apple and oranges" argument is therefore adversely controlled by the general rule which they acknowledge (Opp. Br. 10) and Eleventh Circuit Rule 33-1(b)(1)(i) & (ii) providing for the identification of "other orders" appealed from in the Civil Appeal Statement. Reply Appendix pages 4-5 demonstrate that the recusal orders were properly identified as "other orders" appealed in the Civil Appeal Statement.

B. Issue Presented to Eleventh Circuit

Excerpts from the recusal argument of Petitioners below (Reply App. 9-18) prove Petitioners' exclusive reliance upon § 455(a) and even the "fair judgment impossible" standards of *Liteky* under the same objective circumstances now presented on certiorari. *Compare* Reply App. 11-14 with Pet. 8-14. What Respondents attempt to label as a "new issue" is but the Eleventh Circuit's error in failing to apply the existing standard of § 455(a) to counsel-based, extrajudicially sourced appearances of bias. The only feature of Petitioners' Petition not presented to the Eleventh Circuit is Petitioners' analysis of the circuit courts' inconsistency in their application of § 455(a) to bias against counsel.

C. Inapplicability of *Butts v. Southern Clays*

The Georgia Court of Appeals *Butts* decision is non-controlling. (Opp. Br. 11-13). The Court will find in *Butts* no mention whatsoever of the kind of unconscionability counts in *Cheeves & Gibson* which compel reversal as a

matter of law of the district court's "constructive fraud" error. Neither will the Court find in *Ennis* (Opp. Br. 13) any authority whatsoever adversely controlling the *Cheeves & Gibson* unconscionability counts.

D. Respondents Beg the Question Presented

Respondents' last argument (Opp. Br. 13-19) continues their avoidance of objective, extrajudicial circumstances (Pet. 8-14), perpetuates circuit error in attempting to deal with counsel-based bias exclusively under § 144 and § 455(b)(1) (Opp. Br. 16), and simply ignores the inconsistency apparent on the face of all the authorities reviewed by Petitioners. Such inconsistency remains notwithstanding Respondents' attempts to deny it.

III. CONCLUSION

Respondents respectfully pray that their petition for a writ of certiorari be granted in order to present the circuit courts with guidance insuring that all litigants before the United States courts are immunized under § 455(a) from bias against their **counsel** as well as themselves.

Respectfully submitted,

FRANKLIN R. NIX
1020 Foxcroft Road, N.W.
Atlanta, Georgia 30327-2624
(404) 237-0387
Petitioners' Counsel of Record

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

CURTIS CHEEVES, et al., Plaintiffs,	:	C.A. 86-43-1-MAC (WDO) NOTICE OF APPEAL
vs.	:	
SOUTHERN CLAYS, INC., et al., Defendants.	:	C.A. 86-44-2-MAC (WDO) NOTICE OF APPEAL
THEODORE GIBSON, et al., Plaintiffs,	:	
vs.	:	
SOUTHERN CLAYS, INC., et al., Defendants.	:	

NOTICE OF APPEAL

(Filed Jan. 10, 1994)

Notice is hereby given that the Plaintiffs in the above-styled causes, CURTIS CHEEVES, et al. and THEODORE GIBSON, et al., by and through their undersigned counsel of record, hereby appeal to the United States Court of Appeals for the Eleventh Judicial Circuit from the following Orders and Judgments entered in the above-styled consolidated causes:

(1) Order of September 14, 1993, entered on docket September 14, 1993;

(2) Judgment of September 15, 1993, entered on docket on September 16, 1993, said Judgment being pursuant to the above-referenced Order of September 14, 1993, granting summary judgment in favor of the Defendants; and

(3) Order of December 17, 1993, entered on docket on December 17, 1993, denying Plaintiffs timely filed Motion to Alter, Amend, and Reconsider the above-referenced Order of September 14, 1993.

True copies of the above-referenced orders are attached hereto and incorporated herein by reference.

All proceedings in the above-styled consolidated causes have already been transcribed and are already a part of the record. The Clerk of Court shall omit nothing from the record in transmitting it to the United States Court of Appeals for the Eleventh Judicial Circuit.

Plaintiffs' counsel have been advised by telephone that Mary C. Trawick, as Administratrix of the Estate of John Cheeves, and Myrian Trawick Hall, as Administratrix of the Estates of Rosetta C. Napier and Mary C. Trawick, wish to have their appeal from the above-referenced orders prosecuted by the undersigned counsel. Pursuant to the "Consent Order Pursuant to Status Conference of June 8, 1993" which was filed June 18, 1993, and the subsequent Consent Order entered July 27, 1993, Mary C. Trawick, Sarah Cheeves, Ernestine Cheeves, Myrian Trawick Hall, and Gloria Trawick Lord shall advise the Court by correspondence to be hereafter filed, that they have retained Messrs. Devine and Nix to prosecute their appeal as well as to prosecute as their counsel of record all further proceedings in the above-referenced *Cheeves* case.

This Notice of Appeal is filed as well on behalf of Ethel Cheeves Wilson, who is represented by G. Lee Dickens, Jr., Esq., this Notice of Appeal having been signed on Mr. Dickens' behalf with express permission.

Respectfully submitted this 7th day of January, 1994.

/s/ Foy R. Devine
FOY R. DEVINE
Georgia State Bar No. 219900

2931 Piedmont Road, NE
Atlanta, Georgia 30305
(404) 233-4141

/s/ Franklin R. Nix
FRANKLIN R. NIX
Georgia State Bar No. 544750

2931 Piedmont Road, NE
Atlanta, Georgia 30305
(404) 233-3801

COUNSEL OF RECORD
FOR PLAINTIFFS

/s/ G. L. Dickens, Jr. (FRN)
G. L. DICKENS, JR.
Georgia State Bar No. 220500
(signed by Franklin R. Nix
w/ express permission)

140 West Washington Street
Milledgeville, Georgia 31061
(912) 452-0595

COUNSEL FOR
ETHEL CHEEVES WILSON

IN THE UNITED STATES COURT OF APPEALS
ELEVENTH JUDICIAL CIRCUIT

CURTIS CHEEVES, et al. and THEODORE GIBSON, et al.,	:	
Plaintiffs,	:	APPEAL No. _____
vs.	:	
SOUTHERN CLAYS, INC. and THE RHODE ISLAND CHARITIES TRUST,	:	
Defendants.	:	

INDEX TO ORDERS ATTACHED

Pursuant to Eleventh Circuit Rule 33-1(b)(1)(i) & (ii), indexed below are the Orders and Judgments appealed from in the above-styled cause:

SUMMARY JUDGMENT ORDERS	TAB
Order of December 17, 1993, denying Plaintiffs-Appellants' Motion to Alter, Amend and Reverse Summary Judgment Order entered September 14, 1993	1
Judgment entered September 15, 1993	2
Order of September 14, 1993 entering Summary Judgment against Plaintiffs-Appellants	3
Order of December 17, 1986 entering partial Summary Judgment against Plaintiffs-Appellants	4

ORDERS DENYING RECUSAL

Order of June 5, 1992 5

Order of December 13, 1991 6

/s/ Foy R. Devine
FOY R. DEVINE
Georgia Bar No. 219900
Counsel for Appellants

FOY R. DEVINE, P.C.
2931 Piedmont Road, N.E.
Atlanta, GA 30305-2786
(404) 233-4141

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-8070

CURTIS CHEEVES et al., and
THEDORE GIBSON, et al.,

Plaintiffs-Appellants,

v.

SOUTHERN CLAYS, INC. et al.

Defendants-Appellees.

On Appeal from the United States District Court for
the Middle District of Georgia
Macon Division

BRIEF OF APPELLANTS

(Filed April 15, 1994)

G. LEE DICKENS, JR.
Ga. Bar No. 220500

140 West Washington Street
Milledgeville, Georgia 31061
(912) 452-0595

FOY R. DEVINE, P.C.
FOY R. DEVINE
Ga. Bar No. 219900

2931 Piedmont Road N.E.
Atlanta, Georgia 30305-2786
(404) 233-4141

FRANKLIN R. NIX
Ga. Bar No. 544750

Counsel for Appellants

2931 Piedmont Road N.E.
Atlanta, Georgia 30305-2786
(404) 233-3801

[p. 41] * * *

C. Plaintiffs' Evidence Creates A Jury Issue On The Tort Of Unconscionability, Which Is A Species Of Actual Fraud.

In Count Three of their respective complaints both the Cheeves and the Gibson families alleged that they were entitled to recover actual and punitive damages, as well as reasonable attorneys fees for that *per se* form of fraud defined in terms of unconscionability. (R1-1-8-9; SR1-1-8-9). In its original order granting partial summary judgment entered on December 17, 1986, the court below granted summary judgment as to Count Three concluding that [p. 42] "this court has its basis in constructive fraud, if fraud at all." (SR1-17-5 & 9).

The court below erred in holding that the tort of unconscionability is *constructive, rather than factual fraud.* The Supreme Court of Georgia has stated:

> "An unconscionable contract is one abhorrent to good morals and conscience. It is one where one of the parties takes a *fraudulent advantage* of another. 'An unconscionable contract is one such as no man in his senses and not under a delusion would make on the one hand, and as no honest and fair man would accept on the other'."

Hall v. Wingate, 159 Ga. 630, 667, 126 S.E. 796, 813 (1924).

Clearly the above-stated definition connotes wilful moral turpitude and dishonesty in contrast to "constructive fraud," which arises from innocent misrepresentations not made with a guilty purpose or intent to defraud. *Gaultney v. Windham,* 99 Ga. App. 800, 109 S.E.2d 914 (1959).

In the case of *Roberts Pest Control Company v. McDonald*, 132 Ga. App. 257, 208 S.E.2d 13 (1974), the Court of Appeals upheld a jury verdict awarding general and *punitive* damages to a home owner against a contractor based upon the theory of unconscionability. The court observed: "Unconscionability is *directly related to fraud and deceit*, which in turn may be found where there is great inadequacy of consideration *or* great disparity of mental ability." *Id.* 132 Ga. App. at 260, 208 S.E.2d at 15 (emphasis added).

There can be no question that punitive damages, formerly known as "exemplary damages", cannot possibly be awarded in cases of mere *constructive* fraud arising out of innocent misrepresentations. It is clear that the court below erred in granting summary judgment to the defendant on this count. In its order the court did not apply any law to the facts of this case. It simply granted summary [p. 43] judgment to the defendants upon its determination, unsupported by any legal authority, that the tort of unconscionability is one of constructive, rather than actual fraud. Although plaintiffs have twice moved the district court to reconsider its ruling, it has declined to do so. (R5-173-65-66; R7-239-1).

The above-cited abundant evidence in the record would readily support a jury's conclusion that Southern, a mining company operating through attorneys and persons knowledgeable in the industry, purchased from the Cheeves family 9,800,000 crude tons of kaolin worth at least $2,450,000 for only $35,000. Similarly, a jury could find from evidence that Southern purchased from the Gibson family 4,900,000 crude tons of kaolin worth ***at least*** between $1,440,000 to $2,450,000 for a payment of

only $40,000. The Georgia Code as well as common law holds that where the inadequacy of consideration in a contract is "great, it is a strong circumstance to evidence fraud." O.C.G.A. § 13-3-46. A jury could surely find from plaintiffs' damages evidence that these transactions were ones that "no sane man not acting under a delusion would make and no honest man would take advantage of . . . ". *Hall v. Wingate, supra.* Thus, the court committed reversible error in granting summary judgment to the defendants on Count Three of plaintiffs' complaints.

[p. 47] * * *

II. THE TRIAL JUDGE ERRED IN FAILING TO DISQUALIFY HIMSELF UNDER 28 U.S.C. § 455.

In orders entered on December 13, 1991 (RE-185) and on June 5, 1992 (RE-210), the district court denied two motions filed by plaintiffs seeking its recusal based upon claims of bias or prejudice on the part of the district court against plaintiffs' original counsel, Franklin R. Nix. Plaintiffs sought a petition for mandamus from this Court, which was denied per curiam on June 26, 1992. Plaintiffs have preserved this issue, and it is now presented to this Court in the context of a direct appeal from the entry of a final order. This Court's previous denial of the writ of mandamus does not foreclose review and reversal of those orders denying recusal. *E.g., Phillips v. Joint Legislative Committee,* 637 F.2d 1014 (5th Cir. 1981), *cert. denied,* 456 U.S. 960 (1982). When it previously considered plaintiffs' writ of mandamus, this Court was empowered to grant the extraordinary remedy only if it found under "exceptional circumstances that the district court was

"clearly and indisputably" in error. *E.g., United States v. Gregory*, 565 F.2d 1132, 1136 (5th Cir. 1981); *In re Corrugated Container Antitrust Litigation*, 614 F. 2d 958, 962 (5th Cir.), *cert. denied*, 449 U.S. 888 (1980). In the context of this direct appeal, this Court may now reverse the lower court upon a finding that it has abused its discretion through a clear "error of judgment." [p. 48] *United States v. Kelly*, 888 F.2d 732, 745 (11th Cir. 1989).

A. STANDARD GOVERNING RECUSAL

28 U.S.C. § 455(a) provides:

> "Any justice, judge, or magistrate of the United States *shall* disqualify himself in any proceeding in which his *impartiality might reasonably be questioned.*" (Emphasis added).

This Court has observed that "[t]he very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." *United States v. Kelly*, 888 F.2d 732, 744 (11th Cir. 1989). The opinion goes on to hold:

> "The standard for recusal under section 455(a) is . . . **'whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality.'** " *Ibid.*

In the recent case of *Liteky v. United States*, No. 92-6921, 62 LW 4161 (March 7, 1994), the United States Supreme Court addressed 28 U.S.C. § 455(a) in the context of "opinions formed by the judge on the basis of facts

introduced or events occurring in the course of the current proceedings, or of prior proceedings . . . ". *Id.* at 4165-4166. By a 5 to 4 decision, the Court ennuciated the test tnat such opinions "do not constitute a basis for a bias or partiality motion ***unless*** *they display a deep-seated favoritism or antagonism that would make fair judgment impossible." Id.* at 4166 (emphasis added).

Justice Kennedy's concurrence, joined in by Justices Blackmun, Stevens and Souter, expressed the opinion that the foregoing test was too lenient. "When the integrity of the judicial system is at stake," *id.* at 4168, the four justices stated:

> "The standard that ought to be adopted for all allegations of an apparent fixed predisposition, extrajudicial or otherwise, follows from the statute [p. 49] itself: Disqualification is required if an objective observer would entertain reasonable questions about the judge's impartiality. *If a judge's attitude or state of mind leads a detached observer to conclude that a fair and impartial hearing is unlikely, the judge must be disqualified.* Indeed, in such circumstances, I should think that any judge who understands the judicial office and oath would be the first to insist that another judge hear the case." *Ibid.* (emphasis added).

B. OBJECTIVE CIRCUMSTANCES

The following facts relevant to antagonism on the part of the court below toward Franklin R. Nix, who ***remains*** plaintiffs' counsel, are as follows:

• Mr. Nix filed a judicial misconduct complaint against the district court on July 20, 1990, expressly complaining of the conduct of the district court in these cases and others. (Misc. Docket No. 90-2132, Complaint).

• Chief Judge Tjoflat, in the exercise of his screening authority to either dismiss a complaint or appoint a special committee under 28 U.S.C. § 372(c)(3), appointed a special committee, even before receiving the written responses of the district court. (Misc. Docket No. 90-2132, Order Appointing Special Committee; Answers to Complaint).

• During the special committee hearings, Chief Judge Tjoflat, in explaining why he convened a special committee stated that "[Mr. Nix] filed a complaint which on its face disclosed all sorts of criminal activities." (Misc. Docket No. 90-2132, Transcript Vol. III, January 9, 1992, at 243).

• The special committee retained as its lead private investigative counsel Alan Sundberg, Esq., a former justice of the Supreme Court of Florida. Based upon an exhaustive investigation, former Justice Sundberg issued a 44-page Investigative Report containing, *inter alia*, the following conclusion. [p. 50]

> "The § 372 complaint raises ***serious claims*** of misconduct by Judges Fitzpatrick and Owens involving a trio of kaolin cases [including *Cheeves* and *Gibson*] . . .
>
> * * *
>
> We have investigated each of Nix's misconduct claims. In the main, your investigators conclude

> that the allegations of misconduct are the product of inference and speculation which are based upon very slender reeds of ***actual fact.*** While the interpretation and liberal extrapolation by Nix of the ***limited facts to which he had access*** **may have *understandably* raised misconduct concerns,** investigation of the factual allegations of the complaint refute beyond any doubt the misconduct charges alleged in the complaint. Although we find no evidence to support the § 372 complaint, ***we hasten to add that we do not believe the complaint was filed by Nix in bad faith or with an improper motive.***"

(Misc. Docket No. 90-2132, Investigative Report, Defendant's Ex. IC-A at 6-7 (emphasis added).

• Notwithstanding the court's assertion in its order of June 5, 1992 that it "harbors no bias or prejudice against Mr. Nix or his clients" (R7-21-3), the district court's previous *sworn* testimony before the special committee might reasonably suggest otherwise to § 455's hypothetical man in the street. Under questioning by Judge Truman Hobbs of the Middle District of Alabama, the court below, to its credit, candidly admitted holding the following attitudes toward plaintiffs' counsel:

> [Judge Owens]: Well, Mr. Nix as you may have observed, is a person who when given one answer then asks you ten more questions. He talks forever. ***I frankly just can only deal with him if I say as little as necessary. And that's the posture I have. He reminds me a lot of some of the prisoners we have to deal [with] repeatedly on 2255.***

(Misc. Docket No. 90-2132, Transcript Vol. II of October 10, 1991, at 342-43) (emphasis added).

• On June 5, 1992, the court issued its order denying plaintiffs' April 9th recusal motion (R6-207) and directed plaintiffs' counsel to "show cause" why he should not be sanctioned [p. 51] under Rule 11 for "harassment" of the court.[7] (R7-210).

• Just three days later, on June 8, 1992, L. Ray Patterson, Esq., a professor at University of Georgia School of Law, acting as counsel for Mr. Nix, filed a motion to recuse the district court in *United States v. Watkins*, C.A. No. 92-32-3-MAC (WDO), founded upon identical grounds previously relied upon by Mr. Nix and incorporating by reference ***every*** prior reversal motion previously filed in *Cheeves* and *Gibson*.

• The district court, however, did not characterize the motion filed by Mr. Patterson as "harassment," nor did it issue an order requiring Mr. Patterson to show cause why he should not be sanctioned under Rule 11.

C. FAILURE TO RECUSE WAS A CLEAR ERROR OF JUDGMENT.

It is clear from the record that there is "a deep-seated . . . antagonism" by the district court toward plaintiffs' counsel, Franklin R. Nix. The judicial misconduct complaint filed by Mr. Nix against the district court alleged criminal misconduct on the part of the judge. There is no

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[7] The district court on Friday, June 5th, had to have known that the misconduct charges filed by plaintiffs' counsel would be dismissed on Monday, June 8th, because § 372(c)(14) required Chief Judge Tjoflat to obtain the court's consent to make public the proceedings.

way of knowing, to an absolute certainty, how the judge really feels about Mr. Nix or the plaintiffs in this case. The judge did candidly admit in his testimony before the special committee that he "just can only deal with him if I say as little as necessary." He also said that Mr. Nix reminded him "a lot of some of the prisoners we have to deal [with] repeatedly on 2255." [p. 52]

The court below has stated that he "harbors no bias or prejudice against Mr. Nix or his client." (R7-21-3). The implication of this statement is that the judge fully expects to give the plaintiffs in this case and Mr. Nix a "fair judgment." *Liteky, supra* at 4166. However, given the history and antagonism between the judge and Mr. Nix, plaintiffs submit, with all due respect to the judge, that a "***fair judgment***" in this matter is impossible.

Strong evidence of the impossibility of a fair judgment is a comparison of the court's rulings in the case at bar with its decision in the strikingly similar case of *McLendon, supra.* In that case, the same judge held that genuine issues of material fact requiring a jury trial existed as to whether a "***buyer with superior knowledge***" had a duty to disclose the presence of kaolin and whether the sellers acted with due diligence so as to toll the statute of limitations. The evidence presented by the plaintiffs in the case at bar is substantively indistinguishable from the evidence presented in *McLendon.* The only plausible explanation for the disparate treatment of ***other counsel*** and plaintiffs in *McLendon* is that the "deep-seated . . . antagonism" between the court below and Mr. Nix has in fact made "fair judgment impossible." *Liteky, supra*

at 4166. Plaintiffs respectfully submit that the court committed a "clear error of judgment" in failing to recuse itself. *United States v. Kelly* at 745.

In *Kelly*, this Court found that the Honorable Richard Freeman committed a "clear error of judgment" in failing to recuse himself based upon his admitted "***discomfort***" in presiding over a criminal trial in which the *husband* of a woman who was a close personal friend of Judge Freeman's wife was called to testify as a ***defense*** [p. 53] witness. Surely the above-quoted antagonism and admitted attitude of the court below toward Mr. Nix substantially exceeds the mere "discomfort" level held by this court to satisfy the "clear error of judgment" standard applied in *Kelly*.

D. ADMINISTRATIVE REASSIGNMENT UNDER 28 U.S.C. § 2106

28 U.S.C. § 2106 provides:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

This section allows this Court broad discretion to require upon remand that a different judge handle the cases at bar during future proceedings. Such a remedy would seem most appropriate in this matter. Plaintiffs in

seeking a "level playing field," need not insist upon an outright disqualification order, which might give rise to adverse inferences regarding the district court's prior denial of recusal motions.

Moreover, 28 U.S.C. § 292(b) provides that the chief judge of the circuit "may, in the public interest, designate and assign temporarily any district judge of the circuit to hold a district court in any district within the circuit." Under this provision, Chief Judge Tjoflat has twice assigned a judge to hear matters in connection with this case.

Plaintiffs submit that under *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), it is not only impartiality which is important, but also the appearance of impartiality. An assignment of a different judge to hear all matters relative to this case in the future will not only guarantee the impartiality of the federal judiciary, but equally as important, it will protect [p. 54] the appearance of impartiality as well. For the foregoing reasons, plaintiffs urge that a reassignment be directed on remand.

As observed more than fifty years ago by the Supreme Court in the context of sustaining a disqualification under 28 U.S.C. § 144,

> "there is no serious detriment to the administration of justice nor inconvenience worthy of mention for of what concern is it to a judge to preside on a particular case; of what concern to other parties to have him so preside?"

Berger v. United States, 295 U.S. 22, 35 (1921).

CONCLUSION

For the foregoing reasons plaintiffs submit that the court below erred in granting summary judgment to the defendants. Numerous genuine issues as to material facts are presented by abundant evidence in the record, including, *inter alia*, whether defendant had a duty to disclose, whether plaintiffs and defendants were in confidential relationships and whether plaintiffs acted with due diligence so as to toll the statute of limitations. Plaintiffs therefore respectfully pray that this Court enter appropriate orders reversing the entry of summary judgment below and reassigning these cases for trial before a different judge in the exercise of the Court's supervisory powers under 28 U.S.C. § 2106.

Respectfully submitted this 13th day of April, 1994.

/s/ Foy R. Devine
Foy R. Devine
Georgia State Bar No. 219900

Foy R. Devine, P.C.
2931 Piedmont Road, NE
Atlanta, Georgia 30305-2786
(404) 233-4141

(signatures continued)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-8071

CURTIS CHEEVES, et al. and
THEODORE GIBSON, et al.,

Plaintiffs-Appellants,

v.

SOUTHERN CLAYS, INC., et al.,

Defendants-Appellees.

On Appeal from the United States District Court for
the Middle District of Georgia
Macon Division

PETITION FOR PANEL REHEARING
(Filed Nov. 23, 1994)

FOY R. DEVINE, P.C.
FOY R. DEVINE
Ga. Bar No. 219900

2931 Piedmont Road, N.E.
Atlanta, Georgia 30305-2786
(404) 233-4141

G. LEE DICKENS, JR.
Ga. Bar No. 220500

140 West Washington Street
Milledgeville, Georgia 31061
(912) 452-0595

FRANKLIN R. NIX
Ga. Bar No. 544750

2931 Piedmont Road, N.E.
Atlanta, Georgia 30305-2786
(404) 233-3801

Counsel for Appellants

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PETITION FOR PANEL REHEARING

I. INTRODUCTION

As a matter of controlling Georgia law under *Erie*, ***both*** of the plaintiffs' actual fraud counts require proof of ***only*** two elements.

A. FRAUD BY SUPPRESSION OF MATERIAL FACTS – §23-2-53.

1. Prima Facie Elements. – "Suppression of material fact as fraud" (R1-1-15; SR1-1-13) requires proof of ***only two essential elements*** under §23-2-53's "particular circumstances" standard: "1) the intentional concealment of a fact and 2) for the purpose of obtaining an advantage or a benefit." *Crawford v. Odom*, 211 Ga. App. 367, 369 (1993).

2. Plaintiffs' Evidence. – In the cases at bar, it is ***undisputed*** that: (1) Defendants' ***admittedly withheld*** from plaintiffs (R5-153-10), consistent with their ***policy*** of nondisclosure (R3-100-206-210; R2-61-46-50; R4-146-152,

159, 213-14), prepurchase quantity, quality, and commercial value [p. 2] information obtained from exploration of plaintiffs' lands (R5-175-Tabs 20, 69 & 70); and (2) withheld such facts for the purpose of obtaining the ***benefit*** of paying the *Cheeves & Gibson* families total payments of **$75,000** for kaolin reserves having a combined value of approximately **$5,000,000** according to the defendants' president's ***own value admissions***. (R5-175 Tab 128; R3-100-241; R5-148-54-59).

B. ACTUAL FRAUD PER SE IN THE FORM OF UNCONSCIONABILITY.

1. Prima Facie Elements. – Both Georgia and federal common law define actual fraud in the form of unconscionability as follows:

> An unconscionable contract is one abhorrent to good morals and conscience. It is one where one of the parties takes fraudulent advantage of another. An unconscionable contract is one such as no man in his senses and not acting under a delusion would make on the one hand, and as no honest and fair man would accept on the other.

Hall v. Wingate, 159 Ga. 630 (1924); *Hume v. United States,* 132 U.S. 406 (1889).

A finding of unconscionability requires proof of only two elements: (1) a delusion (in the cases at bar that the defendants' leases were enforceable); and (2) an unconscionable result reflecting "great inadequacy of consideration." *Roberts Pest Control Co. v. McDonald,* 132 Ga. App. 257, 260 (1974).

2. Plaintiffs' Evidence. – The evidence already recited above – i.e., defendants' procurement of minerals worth almost **$5,000,000** for only **$75,000** – satisfies both "the delusion" [p. 3] and "great inadequacy of consideration" elements of unconscionability. Indeed, the enormity of permitting these transactions to stand can best be understood by comparing them to a hypothetical in which someone sells his home worth **$100,000** for only **$1,500,** ***one sixty-fifth*** of its fair value![1]

* * *

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[1] Although both of the *Cheeves & Gibson* complaints clearly stated counts in unconscionability (R1-1-14; SR1-1-12), which were fully argued at pages 41-43 of the Brief of Appellants, ***both*** of the District Court's orders below (R7-240-1; R8-256-1) ***and even the Brief of Appellees are totally devoid*** of any mention whatsoever of plaintiffs' unconscionability counts, much less any conclusive proof that plaintiffs' above-stated evidence fails to satisfy the two elements of unconscionability.